

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 09-50026(REG)

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5 In the Matter of:

6

7 MOTORS LIQUIDATION COMPANY,

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9 Debtor.

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12 U.S. Bankruptcy Court

13 One Bowling Green

14 New York, New York

15

16 May 7, 2015

17 9:47 AM

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20 B E F O R E :

21 HON ROBERT E. GERBER

22 U.S. BANKRUPTCY JUDGE

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1 Hearing re: Motion Filed by Doris Phillips for Relief from
2 August 9, 2010 Stipulation and Settlement Resolving Claim
3 No. 44614, or Alternatively, Motion to Set Aside

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25 Transcribed by: Dawn South and Sherri L. Breach

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P R O C E E D I N G S

THE COURT: Good morning, have seats, please.

Okay, we're here on General Motor's Liquidation Company. I'd like to get appearances, please, and then thereafter ask you all to sit down. First for Mrs. Phillips and Ms. Powledge?

MR. DAVIS: Josh Davis, Your Honor, along with William Weintraub.

THE COURT: Okay. Mr. Davis and Mr. Weintraub, of course.

MR. STEINBERG: Arthur Steinberg and Scott Davidson from King & Spalding on behalf of New General Motors.

THE COURT: Okay, thank you, Mr. Steinberg.

MS. RUBIN: Good morning, Your Honor, Lisa Rubin of Gibson Dunn for the Motors Liquidation Company.

THE COURT: Right, Ms. Rubin.

MR. GOLDEN: Good morning, Your Honor, Dan Golden, Akin Gump Strauss Hauer & Feld on behalf of the unit holders.

THE COURT: Okay, thank you, folks.

Mr. Davis, I feel very, very badly for Mrs. Phillips, especially with the loss of the kids, but obviously I'm a court of law and required to comply with the requirements of law.

1 I've read your papers four times, and I still
2 don't understand the basis of your claims -- or your claims
3 for relief from me.

4 Mrs. Phillips and the kids had prepetition claims,
5 they were sold to a hedge fund, the family got the money for
6 it, and unless I'm missing something you're looking to
7 recover again on the same claims that were sold away to
8 somebody else and that were released.

9 As I see it the matters before me today don't
10 involve the matters that Mr. Weintraub argued back in
11 February and as to which I ruled about three weeks ago.

12 You haven't stated in your papers that those
13 rulings are wrong, and of course I assume that Mr. Weintraub
14 would take them up the street and the appellate courts, the
15 Second Circuit if it chooses to, or decide whether I was
16 mistaken in that regard or not.

17 But your opponents raise much more fundamental
18 issues, starting with whether you have a standing, and at
19 least one of them, if not both -- I certainly saw it in
20 Ms. Rubin's brief, points out -- and if I flip-flop the
21 parties forgive me -- I'm trying to understand the order
22 you're asking me to vacate under 60(b).

23 I would like you to explain for me in terms that I
24 can understand how you have standing to assert a claim that
25 you're assigned away, that you've sold to someone else, and

1 how you can get a second recovery on that claim. And I use
2 the claim in the singular, although it's my understanding
3 that the Longacre Fund, or Dover Fund, which I guess was
4 managed by the Longacre, which I understand to be a hedge
5 fund manager, how you have standing to assert rights under a
6 claim or claims that were assigned away.

7 Also I need you to help me, what is the order you
8 need me to vacate or modify under 60(b)? I entered an order
9 before that authorized Old GM to settle claims in various
10 amounts with varying levels of Court involvement. Claims
11 below a certain amount without anybody's approval, those
12 (indiscernible) amount, which this claim having been settled
13 for so much falls within (indiscernible) without Court
14 approval but with the consent of the creditors' committee.

15 Unless I totally missed something in lieu of the
16 briefs there is no Court involvement in the ultimate
17 settlement approval -- or the settlement agreement, there
18 wasn't any judicial approval, and I don't understand you to
19 be saying that I acted wrongly when I authorized Old GM to
20 settle claims with the creditors' committee consent.

21 So that causes me to scratch my head and say what
22 am I asked to do under 60(b) even before I (indiscernible)
23 focus on whether your 60(b) request is timely or whether
24 there's a fraud on the Court that would make the timing
25 inapplicable. And then of course if there is a claim of

1 fraud on the Court you have to help me understand why
2 there's a fraud on my court, on me, and nobody ever came to
3 me.

4 So -- usually when I have questions of this
5 character I aim it at both sides, in this case frankly it
6 seems to me kind of one sided, so help if you can.

7 Come on up first, please, Mr. Davis.

8 MR. DAVIS: Thank you, Your Honor, good morning.
9 And I will just probably spend most of my time talking about
10 assignment for now, but I think when we talk about
11 assignment the timeline leading up to the sale of the claim
12 is most important.

13 The Powledge/Phillips plaintiffs had a lawsuit
14 that was ongoing for almost two years prior to the petition
15 of bankruptcy. During the course of that litigation
16 Powledge had submitted numerous discovery requests seeking
17 documents that we now know exist that it's our position
18 should have been produced, but they were not. Of course
19 bankruptcy petition is filed, and we appreciate any
20 discovery and any ongoing litigation is abated at that time,
21 but given the length of time leading up to the petition the
22 fact that certain documents were not provided to Powledge as
23 they then move into bankruptcy become a claimant file before
24 the bar date and then attempt to value their claim in the
25 bankruptcy court, we're saying that those -- the failure to

1 provide those documents substantially prejudiced her ability
2 to value her claim.

3 And what is the claim? It is a lawsuit first. It
4 is an unsecured contested claim based on a tort.

5 So the Court mentioned the order concerning the
6 ADR procedures and that was in February of 2010, and as part
7 of that order -- and I've got a copy, but I'm sure the Court
8 is aware of it -- claimants with wrongful death and other
9 torts were required to provide a capping letter to the -- at
10 that time it was just the debtor -- within 30 days of the
11 order. Powledge plaintiffs did that and agreed to cap their
12 \$250 million claim that was filed to -- in Ms. Powledge's
13 case, now Ms. Phillips' case -- \$55 million.

14 THE COURT: And I think they were 250 million
15 bucks each weren't they?

16 MR. DAVIS: Yes, Your Honor, but --

17 THE COURT: For an aggregate \$250 million times
18 four.

19 MR. DAVIS: I think the --

20 THE COURT: That's a billion?

21 MR. DAVIS: One billion, correct.

22 THE COURT: Okay.

23 MR. DAVIS: So Ms. Phillips' particular claim was
24 250 million and she agreed to cap it at 55 million and sent
25 a letter to that effect in accordance with the Court's order

1 to ADR.

2 That capping letter triggered the ADR procedures.
3 As part of those procedures the parties agreed to attend
4 mediation and they went to mediation and obtained a
5 settlement for their lawsuit. And the settlement is dated
6 August 9th, 2010. The settlement is between the debtor and
7 Ms. Phillips, her stepchildren, and the mother of the
8 deceased husband, Adam Powledge.

9 THE COURT: By the way there were four kids, if
10 I'm not mistaken, and not three?

11 MR. DAVIS: There were four kids in the car. Two
12 of Mr. Powledge's children from another woman were not in
13 the car and survived, and they were older children, and so
14 he had the four children that were in the car and he had two
15 other children that were not in the car.

16 THE COURT: So when they computed the aggregate
17 claim to billion I should have said 1,250,000?

18 MR. DAVIS: No, Your Honor --

19 THE COURT: Well 1,250,000?

20 MR. DAVIS: No, Your Honor, you were correct, it's
21 one billion in the aggregate.

22 THE COURT: Oh, okay.

23 MR. DAVIS: Ms. Powledge, the two children, and
24 then the mom, four times 250-, you were correct.

25 THE COURT: Okay.

1 MR. DAVIS: Now the settlement, and it's in the
2 record, but I brought a copy of it and highlighted a couple
3 portions for discussion purposes. If I may approach?

4 THE COURT: I'll take yours. I have my own, but
5 if you have highlighted it just show it to your opponents,
6 and if they have no objection I'll take what you hand up to
7 me. It's Exhibit D to somebody's filing?

8 MR. DAVIS: Yes, Your Honor.

9 MR. STEINBERG: Your Honor, I don't have any
10 objections to the highlight. Obviously there are things in
11 the stipulation that we would have highlighted that are not
12 highlighted.

13 THE COURT: Somehow I think you know how to bring
14 it to my attention when it's your turn.

15 Come on up, Mr. Davis.

16 MR. DAVIS: I'm just going to turn to the second
17 page, Your Honor. We've identified the effective date of
18 the settlement which is August 9th, 2010. Now --

19 THE COURT: Bear with me a second.

20 MR. DAVIS: Okay.

21 THE COURT: Should I be looking at something you
22 highlighted or something in the remainder of the document?

23 MR. DAVIS: If you look on page 2 you'll see the
24 \$55 million cap and the resolution, and the resolution is on
25 page 3, and the settlement for --

1 THE COURT: Just a shade under four million bucks.

2 MR. DAVIS: In the aggregate.

3 THE COURT: Four million, nine hundred seventy-
4 five thousand?

5 MR. DAVIS: In the aggregate.

6 THE COURT: Yes.

7 MR. DAVIS: For Ms. Powledge individually it's
8 2.7 million rough and change. She's at the top and you'll
9 see that figure, there's a scratch out and it's off to the
10 side.

11 And what the claim becomes is rather than a
12 contested unsecured it becomes an allowed unsecured but with
13 that cap of two six nine nine and seventy-four dollars
14 (sic). The -- and of course it's signed on August 9th,
15 2010.

16 It's our position that when Ms. Powledge attended
17 the settlement conference she was attending to resolve a
18 contested claim without the kind of information that we now
19 have that she should have had as a litigant.

20 Imagine if you will, Your Honor, Ms. Powledge just
21 filing the claim before the petition in bankruptcy in which
22 no discovery had been conducted outside of the bankruptcy
23 court. She then gets to the bankruptcy court, I would hope
24 that some discovery would have been allowed both for the
25 benefit of the debtor as well as the litigant -- the

1 plaintiff, and that discovery would have need to have led to
2 in this particular case the very documents that we know GM
3 was not producing related to other prior defects that are
4 certainly applicable to the claim, the underlying litigation
5 that Powledge was bringing for two years prior to the
6 bankruptcy.

7 THE COURT: Forgive me, Mr. Davis, I'm not called
8 upon to decide today what I would do if there had been a
9 judicial proceeding before me and I had entered an order.
10 I'm not called upon today to decide what I would do if your
11 clients owned the claim. And I'm not called upon today if
12 you had alleged that Old GM's lawyers lied to me in bringing
13 something to my attention or spirited away a witness or did
14 any of the things that would pass muster under my April 15th
15 decision.

16 I'm prepared to assume for the purpose of this
17 discussion that there may well have been or even were
18 discovery violations, but your opponents aren't arguing
19 that. They're saying you don't own the claim, there wasn't
20 a judicial order, and that your position now isn't timely.
21 That's what I need you to focus on, that's where I need your
22 help.

23 MR. DAVIS: And I guess I certainly am, Your
24 Honor, I'm trying to do that, and I'm just I guess taking a
25 path to that discussion that may be a little bit more

1 cumbersome than what the Court would like.

2 But if -- the important point for your 60(b)
3 question is down at the bottom of page 3.

4 "This stipulation and settlement may not be
5 modified other than my signed writing executed by the
6 parties hereto or by or the of the Court."

7 And we cited in our briefing Second Circuit
8 opinions that establish that settlement agreements are
9 suggest to attack under 60(b), and that's -- and I can
10 provide the cite if --

11 THE COURT: Whether or not they've been previously
12 approved by the court?

13 MR. DAVIS: Yes, Your Honor, that's correct, that
14 was what the holding was in that opinion.

15 And in this particular case, given that the Court
16 was ordering ADR in the bankruptcy, and this settlement
17 agreement is the result of that order, I would say that even
18 if we're going to limit the ability to attack a settlement
19 agreement on 60(b) grounds that that is sufficient to meet
20 that standard of Court involvement in the parties'
21 settlement of a claim.

22 I think the other thing I would point out to the
23 Court is on page 2 it says, "Where after, after good faith
24 arms length negotiations." I mean I know it's a preamble,
25 but certainly -- and we've discussed this -- Powledge takes

1 issue with the good faith nature leading up to the
2 settlement agreement concerning her ability to value what
3 was being settled, to provide the consideration, the release
4 of her lawsuit of her claim in litigation for consideration.
5 How can that be valued if the defendant is undermining that
6 position for a variety of reasons while not giving documents
7 that would tend to support that claim, that argument?

8 THE COURT: The contention is that she sold it to
9 the Dover firm for too little money?

10 MR. DAVIS: She settled for too little money. It
11 has nothing to do -- because -- and I'm getting to the
12 assignment, Your Honor, I've got it right here -- if you
13 look at the assignment -- and again, I brought a copy and it
14 has much less highlighted portions, I've got copies for you
15 as well if you just don't have it.

16 MR. STEINBERG: It's attached to our paper. Oh,
17 the assignment.

18 THE COURT: You're talking about the assignment
19 itself and not the evidence of the transfer of claims.

20 MR. DAVIS: The claim sale agreement, the
21 assignment. I have copies.

22 MS. RUBIN: Your Honor, I just want to point out
23 that this particular -- Your Honor --

24 THE COURT: To a microphone, please, Ms. Rubin.

25 MS. RUBIN: Sure, I'd be happy to, Your Honor.

1 Give me one moment, please, to get (indiscernible).

2 The document that Mr. Davis, Your Honor, is
3 presenting the Court with now is not a document that was
4 previously attached to any of the parties' submissions on
5 this motion. There is an evidence of the transfer of claim
6 that was filed publicly on this docket, it's also I believe
7 an exhibit to at least New GM's brief here and cited in the
8 GUC Trust's brief.

9 But to the extent that Mr. Davis now wants to
10 submit to the Court a highlighted version of a transfer
11 agreement between Longacre and his client I just want to
12 point out to the Court this is not a document that I full on
13 have seen, I can't speak for Mr. Steinberg, I'd like to
14 moment to reflect on it before Mr. Davis continues.

15 THE COURT: All right. Well you're certainly
16 allowed to see it and reflect on it.

17 I would have thought that from what he's described
18 it as it's further evidence of something that supports your
19 position that the claimants sold away their claim --

20 MS. RUBIN: That (indiscernible).

21 THE COURT: -- but if you want to look at it
22 that's plainly your right.

23 (Pause)

24 THE COURT: Do I have an objection? Oh,
25 Mr. Steinberg is reading it now.

1 MS. RUBIN: We're sometimes confused as being one
2 in the same, but I'm sure Mr. Steinberg would say we are not
3 the same party.

4 THE COURT: I can tell the difference between the
5 two of you and your clients.

6 MR. STEINBERG: Your Honor, I've read it now. I
7 assume that there's a disclosure paragraph and he's gotten
8 the consent of the buyer to actually present this.

9 THE COURT: Mr. Steinberg, you can lift up that
10 nearby microphone Oprah Winfrey style, but I didn't hear
11 what you have to say.

12 MR. STEINBERG: The assignment has a disclosure
13 paragraph which basically says it's not to be disclosed to
14 anybody, so I assume he's gotten some kind of approval to do
15 what he's about to do.

16 MR. DAVIS: Your Honor, the actual language of the
17 disclosure does not say to anybody, just to any other
18 creditors or debtors for the prospective purchasers of the
19 claim, so -- excuse me -- any other creditors of debtor or
20 prospective purchasers of the claim.

21 THE COURT: I assume the purpose of a provision of
22 that character is to protect the hedge fund from the loss of
23 the advantage it has when people sell their claims to it and
24 it wants to buy people's claims up as cheaply as possible.

25 MR. DAVIS: That's --

1 THE COURT: To me do we know if Dover or Longacre
2 or anybody else is still buying up GM claims?

3 MR. DAVIS: Your Honor, I cannot offer any opinion
4 as to that question, but I will say that GM both knew and
5 the trust their own pleadings have at this point stated how
6 much money Powledge received in exchange for the settlement
7 amount that we've already talked about. So it seems like
8 the contents of the document concerning the transaction are
9 known in the pleadings.

10 THE COURT: So in other words, Mr. Davis, you're
11 saying that on a most important point in the whole agreement
12 from the perspective of a claims buyer the cats already out
13 of the bag?

14 MR. DAVIS: Yes, Your Honor, anybody could do the
15 percentage of, you know, what the claim -- you know, settled
16 for based on the settlement agreement and how much --

17 THE COURT: You divide 3,975,000 bucks by the
18 amount of the settlement?

19 MR. STEINBERG: Your Honor, I don't believe we
20 knew about what the actual converse price was.

21 The only thing I wanted to point out, this is a
22 private agreement between the purchaser and the seller,
23 which has a disclosure provision. If he's now going to hand
24 it to Your Honor it does become a public record. I was just
25 pointing out to counsel whether he's violating a private

1 disclosure arrangement that his clients have. It doesn't
2 pertain to me, it pertains to him and his obligations under
3 the agreement, and that's all I was trying to say.

4 THE COURT: All right.

5 MS. RUBIN: Your Honor, may I --

6 THE COURT: Yeah, go ahead, Ms. Rubin.

7 MS. RUBIN: Your Honor, at page 6 of the GUC
8 Trust's brief we cite docket number 12845 at 1, it's
9 actually a letter from Mr. Davis to this Court in
10 anticipation of an August 18th, 2014 hearing in this court.

11 THE COURT: Pull that mic closer to you, please.

12 MS. RUBIN: Sure. It was through that letter that
13 Mr. Davis disclosed to the Court and thereby to counsel
14 associated here what amount Mrs. Powledge or Mrs. Phillips
15 rather received from Dover Master Fund in respect of her
16 claim. Were it not for that letter that information would
17 not have been available to us.

18 MR. DAVIS: And respectfully, Your Honor --

19 THE COURT: Uh-huh.

20 MR. DAVIS: -- that's not accurate. In the
21 Southern District of Texas prior to this case's removal to
22 this case court the GUC Trust filed a 12(b)(6) motion to
23 dismiss in which the amounts were made apparent in those
24 documents, and those pleadings were included in the removal.

25 So my letter was actually at that time doing

1 nothing but parroting the amounts provided by counsel in
2 response -- or excuse me -- in their 12(b)(6) motion,
3 because frankly, Your Honor, at that point when I wrote that
4 letter other than the motion to dismiss I did not know the
5 figure that my client actually received.

6 THE COURT: All right, here's what we're going to
7 do ladies and gentlemen. You having presented it to
8 Mr. Steinberg and Ms. Rubin and what you're giving me
9 (indiscernible) after the hearing to give them hard copies
10 of what we're talking about. Can you hand it up to me and
11 what will be deemed to be an in camera submission.

12 Frankly, I think the only relevant legal issue is
13 that there was an assignment of the claim or claims.

14 If you want to argue the amount that the claim
15 sold for your opponents may be right that that's a violation
16 of your claims agreement with Dover, but that's an issue
17 between you and Dover, and if you want to argue I will let
18 you at your own risk, and you should understand that if
19 Longacre or Dover sues you for some kind of a
20 (indiscernible) against their trading strategies -- their
21 confidential trading strategies that's a dispute between two
22 (indiscernible) as to which this Court can't protect you
23 because it doesn't have subject matter jurisdiction.

24 If you want to argue the relevance of the amount
25 that your client sold it for you can do that at your own

1 risk. Of course if the cat is already out of the bag then
2 this incremental disclosure results in no additional harm to
3 Longacre, and assuming Longacre is the decision maker for
4 the Dover Fund II, (indiscernible) for anybody who's doing a
5 transcript.

6 So if you want to hand it up to me -- generally
7 what Ms. Rubin said and Mr. Steinberg said to be an
8 objection, which it wasn't quite, but I'll overrule that.
9 If you want to give it to me at your own risk, vis-à-vis,
10 your exposure to Longacre or Dover Fund II I'll permit you
11 to do it. And for the time being I'll take it in camera.
12 Of course anything you say in open court (indiscernible)
13 open court proceeding is going to stay that way is at your
14 own risk.

15 MR. WEINTRAUB: Your Honor, if I --

16 THE COURT: Mr. Weintraub, yes, go ahead.

17 MR. WEINTRAUB: Thank you.

18 I think, Your Honor, there's a difference between
19 the amount that Mrs. Powledge reduced her claim to, which I
20 don't think is confidential, and the payment rate under the
21 agreement with Longacre, which might be confidential, and I
22 think Mr. Davis could make his point without disclosing the
23 payment rate.

24 His point is that the claim was liquidated in an
25 amount and then sold to Longacre, and I think that the

1 purchase rate, which is the percentage times the allowed
2 amount of the claim, is not something that's necessary for
3 Mr. Davis to make his point that Mrs. Powledge reduced her
4 claim from \$55 million to a much lower amount based upon a
5 lack of information.

6 So I think we can thread this needle by not
7 disclosing the payment rate, because I haven't heard anyone
8 say that the amount to which the claim was reduced is
9 confidential. That's the allot amount of the claim. What
10 somebody paid for the claim is a different question.

11 THE COURT: I don't follow you, Mr. Weintraub, and
12 I'm going need either you or Mr. Davis to help me.

13 MR. WEINTRAUB: Sure.

14 THE COURT: I thought that the claims were
15 resolved, vis-à-vis, the Old GM estate in the aggregate
16 amount of 3,975,000 bucks. I assume that on account of that
17 Dover Fund II paid Mrs. Phillips some dollar amount that's
18 disclosed in the document that Mr. Davis is about to give
19 me.

20 MR. WEINTRAUB: Right. And I think, Your Honor,
21 that Mr. Davis does not have to disclose the payment rate
22 that Longacre paid for an allowed claim of \$3.9 million.

23 His point is that claims that started at a billion
24 dollars and then were reduced to \$55 million and then again
25 were reduced to \$3.9 million, those reductions were done

1 based upon a lack of information.

2 THE COURT: I understood that contention from the
3 start and that was why I interrupted Mr. Davis to say that I
4 need him to talk about standing and I need him to talk about
5 timing.

6 MR. WEINTRAUB: Right, and I think the reason he
7 wants to show you that agreement is not to show you the
8 payment rate that was paid by Longacre, he wants to refer to
9 some of the other provisions in that agreement.

10 So we can address the confidentiality by not
11 getting into the payment rate and just talking about the
12 highlighted provisions.

13 THE COURT: Okay, Mr. Weintraub, but can't most of
14 the people in this room if not in my kid's tenth grade class
15 engage in a division exercise and divide two numbers and
16 come up with a percentage?

17 MR. DAVIS: Yes, Your Honor, and that's something
18 that they can do with the documents that GM has already
19 filed.

20 So again, with regard to the actual contents of
21 what Longacre would want to maintain confidentiality on,
22 those figures are already out there and you can certainly do
23 that division to identify that rate.

24 I think what Mr. Weintraub is saying is that the
25 claim sale agreement and the assignment itself in no way

1 assigned my client's right to attack the settlement
2 agreement -- not the claim, the settlement agreement --
3 because it was obtained through misrepresentations that were
4 unknown to her at the time that she provided the
5 consideration she did for the settlement agreement.

6 And, Your Honor, I think I'll pivot at this point
7 because we're not --

8 THE COURT: We spent a lot of time on this
9 discussion. Are you asking for a ruling from me? Are you
10 asking to hand me a document or are you withdrawing that
11 request?

12 MR. DAVIS: I'm fine to withdraw that request at
13 this point, Your Honor.

14 THE COURT: Okay. Move on with your argument.

15 MR. DAVIS: Great.

16 Enron, the court cited it favorably, Judge
17 Gonzales' opinion in footnote 210 of the Court's April 15th
18 order. That case, it basically disallowed the whitewashing
19 of sold claims by claimants that were -- that had unclean
20 hands. And the court agreed with that opinion strongly
21 based on the --

22 THE COURT: I think the word he used was
23 laundering rather than -- like the Mafia does rather than
24 whitewashing.

25 MR. DAVIS: And -- that's fine, Your Honor.

1 I think that the opinion stands for the
2 proposition that claimants that are engaged in any sort of
3 fraud or do not have a -- that have essentially a wrongful
4 claim cannot turn around and either assign or transfer their
5 claim to a third party and then have that third party demand
6 that that claim be paid or that that assignment be honored.

7 And Judge Gonzales' opinion was willing to look
8 back at the underlying transaction, the I understand lying
9 merits of the original claimant and say that I'm not going
10 to allow that sort of purchase of that kind of claim.

11 THE COURT: Pause please, Mr. Davis. Wasn't the
12 underlying concept of Judge Gonzales' Enron decision that
13 the assignee of a claim can have no greater rights than the
14 assignor? And wasn't that the same principal that when the
15 Third Circuit decided its KB Toys decision to the same
16 effect and it rejected Judge Sheindlin's analyze which had
17 reversed Judge Gonzales with the underpinning of the Third
18 Circuit's view as well?

19 MR. DAVIS: Well, Your Honor, and of course you
20 talked about that case. I was actually referring to the --
21 not the KB Toys and that Enron decision that was reversed, I
22 was referring to Judge Gonzales' opinion out of this
23 Southern District of New York concerning Enron and that the
24 court cited favorably in that footnote in which those things
25 are all true and the court agreed with that Third Circuit

1 opinion, and I appreciate that, but what the court also
2 agreed with was the bankruptcy court's decision in another
3 Enron case, which I think you cited as Enron II, that a
4 claim does not become somehow cleaner for a subsequent
5 purchaser or a subsequent assignee in the event that the
6 underlying claim and the merits of the underlying claimant's
7 claim is wrongful, fraudulent, or if there's some other
8 arguments concerning the merits of that claim.

9 The assignee cannot avoid those arguments because
10 of the assignment, and they don't get the automatic right to
11 present that claim as assigned and not have the merits of
12 the underlying claim assessed, and certainly any defenses
13 that the debtor may allege concerning that claim that would
14 have applied to the original claimant, they can make those
15 same arguments to the assignee of the claim. Even if --

16 THE COURT: Yeah, I understand that. That walks
17 and talks and quacks like what I was just talking about.

18 MR. DAVIS: Okay.

19 THE COURT: Are you --

20 MR. DAVIS: And I'm saying --

21 THE COURT: -- making reference -- give me both
22 cites to both of Judge Gonzales' bankruptcy court Enron
23 decisions and I'll see whether you're bringing anything to
24 the table beyond what I thought you were saying.

25 MR. DAVIS: I'm sorry, it's footnote 208 of Your

1 Honor's April 15th opinion.

2 THE COURT: Okay.

3 MR. DAVIS: You cite the KB Toys case there, you
4 cite Enron District, and that cite is 379 B.R. 425.

5 THE COURT: That's Sheindlin I assume.

6 MR. DAVIS: Correct. And then you cite Judge
7 Gonzales' opinion, and I'm, it wasn't Enron II, but Enron
8 Bankruptcy is how you referred to it subsequently, and
9 that's 340 B.R. 180.

10 And I'm bringing up that case because the Court's
11 focus on assignment to Longacre to Dover suggests that
12 somehow Powledge's settlement, which we allege was based on
13 misrepresentation, and can somehow -- and the conduct by GM
14 leading up to that settlement can somehow be whitewashed by
15 the assignment of what became an allowed liquidated claim as
16 opposed to what she had leading up to the settlement
17 agreement which was an unliquidated contested claim.

18 And so those equitable arguments can work in
19 reverse for Powledge because she did not know the value of
20 her lawsuit which represents releasing that lawsuit, becomes
21 the consideration for the allowed claim of -- you know, for
22 her, 2.7 million.

23 Now that 2.7 million of course did become -- those
24 warrants were assigned to Dover, but Powledge nowhere in her
25 assignment of claim and nowhere in the document I was going

1 to present the Court with does she assign the settlement
2 agreement, she assigns the allowed liquidated claim that
3 became the consideration underlying the settlement
4 agreement.

5 THE COURT: Why isn't the remedy then for her to
6 go to Dover, so give us back the -- how much did she get for
7 those four claims?

8 MR. DAVIS: Well it's in the record, and if I -- I
9 mean we've had a long discussion about that.

10 THE COURT: We're not talking about percentages --

11 MR. DAVIS: Gotcha.

12 THE COURT: -- we're talking about how much she
13 got for those claims?

14 MR. WEINTRAUB: Your Honor, that was --

15 THE COURT: I thought you said that's already in
16 the record.

17 MR. DAVIS: It is in the record, I just --

18 THE COURT: Then tell me.

19 MR. DAVIS: Okay. The total gross consideration
20 for the 3.9 million was \$1,172,625.

21 THE COURT: One million one hundred seventy-two
22 thousand. Okay.

23 MR. DAVIS: So --

24 THE COURT: And then my question to you is why
25 doesn't she ask Dover to give her back the 1.17 million

1 (sic) bucks and then say that I'm willing to waive the
2 earlier allowance of my claim and give me a do over? Kind
3 of like I've said or implied would often be the remedy for a
4 denial of due process in other circumstances.

5 MR. DAVIS: Well --

6 THE COURT: It sounds to me like she's trying to
7 keep the 1,172,000 and then go back to the GUC Trust for
8 even more.

9 MR. DAVIS: No, Your Honor, I think we've at some
10 point stated that in the event we obtain relief would be
11 fine to produce that amount for the trust and continue to
12 litigate that.

13 I would respectfully suggest that in response to
14 Your Honor's decision a person's ability to attack a
15 settlement agreement cannot be dependent upon getting them
16 to agree to reverse an assignment in which the merits of the
17 settlement agreement or the underlying lawsuit that resulted
18 in the settlement agreement were never part of the
19 consideration for the assignment itself.

20 I mean the Court is essentially suggesting just
21 have this transaction, undo it, certainly if Dover would
22 ever agree to this, which who knows and I doubting that they
23 would, but they would certainly expect some return on that
24 investment in addition to what is the consideration that was
25 provided in August of 2010.

1 But Dover never obtained the right to the lawsuit
2 that represents the settlement agreement, and the assignment
3 was not about the lawsuit, the assignment was about what the
4 claim became as a result of the settlement, which was an
5 allowed claim for a set liquidated amount.

6 So, I don't know -- and again, I point this out, I
7 mean essentially Powledge had her settlement and all she had
8 was warrants and she sold those warrants, which was just an
9 allowed claim, and investors like they do --

10 THE COURT: The settlement didn't give her stock
11 and warrants like every other -- I mean didn't allowed
12 claims in the Old GM case give prepetition unsecureds stock
13 and warrants?

14 MR. DAVIS: The settlement agreement is silent to
15 that, Your Honor, and frankly I wasn't counsel --

16 THE COURT: Doesn't the settlement agreement
17 provide in rules or substance that in exchange for an
18 allowed claim of this amount the selling party, which is the
19 family, will get the treatment under Old GM's plan?

20 MR. DAVIS: Yes.

21 THE COURT: And didn't Old GM's plan give
22 unsecureds -- general unsecureds a bundle of stock and two
23 types of warrants?

24 MR. DAVIS: Yes.

25 THE COURT: So are you saying something different

1 -- that she got something different than all of other
2 general unsecured claims got?

3 MR. DAVIS: No, Your Honor.

4 THE COURT: So had she not sold her claim, she
5 would have got on account of allowed claims in the aggregate
6 of just under \$4 million, whatever any other general
7 unsecured creditor who had a claim of just under 4 million
8 bucks would get.

9 MR. DAVIS: Yes.

10 THE COURT: Okay. But now you're trying to tell
11 me something different than that.

12 MR. DAVIS: I'm saying that when she had those
13 allowed unsecured claims like everything else the fact that
14 she turned them into cash so that she didn't have to
15 maintain debt in a company that she believed killed her
16 family is not unreasonable, and that transaction --

17 THE COURT: I didn't understand your opponents to
18 be saying that it was unreasonable.

19 MR. DAVIS: Okay. Well --

20 THE COURT: All they're saying is that she sold
21 it.

22 MR. DAVIS: Well the -- but the transaction, that
23 is selling that claim, does not in any way implicate the
24 settlement agreement and the lead up to the settlement
25 agreement and the valuation of what her claim was prior to

1 the settlement agreement. And that is where -- you know,
2 what is what we're attacking.

3 Now, I think that the argument here is it's just
4 very convenient that GM can make the argument that she then
5 turned her settlement and the warrants that were provided as
6 consideration for that settlement for her lawsuit into cash
7 in a secondary market and somehow loses the right to
8 complain about GM's bad acts leading up to the settlement
9 agreement. That is the core of the argument against the
10 assignment issue and certainly what we're saying concerning
11 this standing issue.

12 Now we've cited in our brief the Court is not
13 required to provide 60(b) relief to say that there were
14 misrepresentations leading up to the settlement agreement
15 and it should be void. The question just becomes how do we
16 resolve the fact that the void settlement agreement was
17 subsequently turned into an assignment to Dover and that
18 those warrants were eventually I'm sure cashed by Dover at
19 some later point or negotiated by Dover at some later point?
20 But the fact that that transaction occurred I'm sure GM --
21 the Trust doesn't want the cash that was exchanged in 2010
22 between Powledge and Dover. If this were to happen I would
23 expect that they would want the value of \$2.7 million worth
24 of warrants as best as those can be valued in today's
25 dollars to go back to it -- to go back to the Trust so that

1 Powledge gets to go on, get the discovery documents she was
2 entitled to so that she can fairly value the claim prior to
3 reaching a settlement. That's the argument.

4 And the assignment and the nature of the
5 assignment just being a liquidated allowed claim -- and,
6 Your Honor, I was here for the two days of argument and I
7 heard certain the Powledge's case brought up multiple times,
8 but I also heard the Court's concern, and it shows up in the
9 April 15th order, that the plaintiffs were only seeking
10 relief for themselves as opposed to other claimants within
11 the trust, and that was a concern.

12 This relief that we're seeking it does benefit
13 other claimants. And how does it do that? It insures that
14 when claimants are conducting these transactions that if the
15 claim that they are subsequently selling in the secondary
16 market is the result of fraud or misrepresentation and is
17 significantly unvalued, that they're going to be able to
18 make that case later on down the road and not -- and
19 certainly those purchasers want to be able to know that too,
20 because that's the only way that the --

21 THE COURT: So there can be double dips in --

22 MR. DAVIS: No, Your Honor.

23 THE COURT: -- claims against the estate? One by
24 the hedge fund and one by the underlying assignor of the
25 claim?

1 MR. DAVIS: No, so that the risk regarding the
2 value or the lack of value of the underlying consideration
3 remains with the debtor and is not shifted on those
4 conducting the transaction, those providing liquidity.

5 Because if the Court -- let's say hypothetically
6 that the assignment issue is dispositive for the Court and
7 you say, nope, she assigned her claim, what does that tell
8 future, for example, wrongful death claimants or future
9 litigants that are brought into bankruptcy and subsequently
10 reach some sort of settlement and then settle their claim?
11 It tells them that they should not do that at all. They
12 should not negotiate in the secondary market certainly
13 making it easier for this Court to conduct its business as
14 it negotiates claims by having -- you know, by dealing with
15 financial people as opposed to aggrieved families, something
16 that is, you know, going to lead to -- well, I mean imagine
17 if all of the claimants that had wrongful death or tort
18 claims and had those resolved through the ADR process, did
19 not sell their warrants in the secondary market because they
20 felt like I better hold onto this, because if I don't I'm
21 not going to have a right to attack the value of my
22 settlement agreement in the future if I was duped and I
23 don't know it. That holding would undermine the secondary
24 markets, because all of these wrongful death and tort
25 plaintiffs based on that holding will hold their warrants,

1 will hold their claims, will not sell them, and will ride
2 out the bankruptcy arguing for the most value that they
3 possibly can and insure that when they do exchange their
4 warrants it's with the trust itself and not on the secondary
5 market.

6 THE COURT: Mr. Davis, like many people I don't
7 like to see people duped, but couldn't the parade of horrors
8 that you're discussing be addressed by instead of entering
9 into a settlement agreement with the content that we had
10 here say in the clause right after the one that says I am
11 releasing all claims, known or unknown, provided however
12 that if there has been material non-disclosure or false
13 statement of fact that this release will be negatory?

14 MR. DAVIS: And, Your Honor, I certainly wish that
15 that's what that said.

16 THE COURT: That isn't what it said does it?

17 MR. DAVIS: It's not, but at the same time the
18 case law doesn't require that to attack a settlement
19 agreement, and in fact in New York it's not just that the
20 misrepresentation must be intentional, an unintentional
21 misrepresentation is sufficient to toss out a settlement
22 agreement, even with the kind of boilerplate language that
23 Your Honor references. And the Court will know that when
24 you issued your ADR procedures and that order you provided
25 as an exhibit a sample settlement agreement and it mirrors

1 exactly the settlement agreement that Ms. Powledge was --
2 did sign.

3 So when the Court talks about the involvement of
4 Your Honor in terms of how we got here and that particular
5 language you're citing we are talking about a unilateral
6 boilerplate language -- release language regarding that
7 claim that Ms. Powledge had no ability to negotiate over.
8 All she could do was do the very best that at the time she
9 could have done given the lack of documents in valuing her
10 claim.

11 She valued her claim, she settled her claim, she
12 was given the settlement agreement as it reads just like all
13 of the other, you know, people that had litigation matters
14 that were subject to that ADR order, and she signed it with
15 that boilerplate language.

16 The State of New York and the Second Circuit do
17 not require that a misrepresentation leading to a settlement
18 agreement must be intentionally misrepresented. Unintended
19 misrepresentations are sufficient to void a settlement
20 agreement.

21 Sort of continuing on. Since we're talking about
22 the settlement agreement as opposed to the assignment, and I
23 think the equitable mootness arguments I've tried to address
24 by saying, you know, other claimants are benefited if
25 Powledge gets relief because they will know that their

1 claims are not going to be undermined if GM rides out
2 bankruptcy, not providing documents that would provide
3 evidence of the value of their claim that it will not get
4 off.

5 THE COURT: Forgive me, Mr. Davis. That was
6 totally upside down. I have tens of thousands of Old GM
7 creditors represented by Ms. Rubin whose claims have already
8 been allowed in fixed amounts, and you're saying that
9 they're going to be benefited by additional claims tapping
10 whatever cash is available for them, or for that matter the
11 traders in GUC Trust units represented by Mr. Golden who
12 invested on the premise that the claims totally allowed
13 against the estate could only go down and not up? And
14 you're saying they would benefit by exactly the opposite?

15 MR. DAVIS: By insuring fairness for the process,
16 yes. Because what happens if those other claimants --

17 THE COURT: Go ahead and make your next point,
18 Mr. Davis, that one is insulting my intelligence.

19 MR. DAVIS: Okay. I looked very hard for a case
20 that was very on point for the particular facts of this case
21 regarding the settlement agreement. Spaulding v. Zimmerman
22 is the closest I could find. It's in no way -- it's a
23 Supreme Court case from Minnesota, it's the Supreme Court of
24 Minnesota, certainly not binding on the Court, but the facts
25 are very, very similar to these facts, and I have the cite.

1 It's 263 Minn, M-I-N-N 346.

2 In that particular case the plaintiff came back
3 and they made a 60(b) -- excuse me -- a 60.02 argument of
4 their civil rules that that provision of their civil rules
5 mimics exactly the language of 60(b) in the federal rules,
6 trying to attack a settlement agreement that was obtained as
7 a result of the plaintiff not being able to fairly value
8 their claim.

9 I have copies for opposing counsel.

10 THE COURT: Were they cited in your briefs?

11 MR. DAVIS: No, Your Honor, I found this case as I
12 was preparing for argument.

13 THE COURT: You understand that when guys like me
14 do their jobs they do their preparation based on briefs?

15 MR. DAVIS: Yes, Your Honor.

16 THE COURT: And am I also correct that you filed
17 both an original brief and two replies?

18 MR. DAVIS: One was a --

19 THE COURT: One reply affixing the other reply I
20 gather or amending it, but --

21 MR. DAVIS: That's correct, Your Honor.

22 THE COURT: -- you're -- let's not count it as
23 three briefs, you gave me two?

24 MR. DAVIS: An original motion and a reply brief,
25 yes, Your Honor.

1 THE COURT: Mr. Steinberg and Ms. Rubin, do you
2 care if he gives me one now that was not submitted earlier
3 and to which you had no earlier opportunity to respond?

4 MS. RUBIN: Subject to our ability to respond.

5 THE COURT: Can't hear you, Ms. Rubin, pull the
6 mic closer to you.

7 MS. RUBIN: Subject to the Trust's ability to
8 respond at a later time if appropriate, no, Your Honor, I
9 don't mind.

10 THE COURT: You're on the same page with
11 Ms. Rubin, Mr. Steinberg?

12 MR. STEINBERG: Yes, Your Honor, as long as we
13 have an opportunity to read this case, see whether it's ever
14 been overruled since 1962, and other things like that, then
15 as long as we reserve our rights he can say what he wants to
16 say.

17 THE COURT: All right. I'm going allow you to
18 submit it, Mr. Davis. I'm simultaneously giving anybody
19 else in the case the opportunity to file a written response
20 addressing that case, and don't ever do this to me again.

21 MR. DAVIS: Yes, Your Honor. May I approach with
22 the case?

23 THE COURT: Yes. For the record he handed me
24 Spaulding versus Zimmerman, 263 Minn 346, a decision of the
25 Minnesota Supreme Court from 1962.

1 Go ahead, Mr. Davis.

2 MR. DAVIS: It is a dated case, Your Honor, but
3 it's just very on point, and I've got some highlighted
4 provisions here.

5 The case concerns a lawsuit in which a minor
6 reached a settlement agreement from a car wreck. The
7 defendant and the defendant's lawyer in that case were
8 provided an opportunity to evaluate that plaintiff and they
9 discovered that the injuries that the plaintiff was
10 suffering was potentially much greater than what the
11 plaintiff was aware of.

12 The court, in evaluating the plaintiff's 60(b)
13 motion -- and kind of a little bit more factual background
14 -- the plaintiff joined the military or attempted to join
15 the military when he was older and it was at that time that
16 a physician identified the more serious brain injury that
17 could have possibly been the result of the car wreck. And
18 the -- whether or not it was or it was not was not
19 dispositive for the 60(b) motion. And I'm calling it a
20 60(b) motion even though it's not because it's identical to
21 the federal rule.

22 But the court essentially said that because of the
23 inability for the minor and the court's involvement in the
24 case to approve the settlement to be aware of the
25 significance or potential significance of the injury and

1 because the defendants and defense counsel failed to
2 disclose what they knew, which was that it was much more --
3 potentially much more serious, the court was willing to set
4 aside that settlement agreement and allow the plaintiff to
5 proceed with the claim with his newfound knowledge
6 concerning his aneurysm.

7 Certain the court relies heavily on the fact that
8 it was a minor and the fact that the settlement agreement
9 itself was -- had to be approved by the court, and when the
10 defendants and the plaintiffs came for the approval the
11 defendants had the duty to disclose that information at that
12 time.

13 I would say though and respectfully suggest that
14 that involvement is in my view certainly analogous to the
15 Court's ordered ADR, the form of this -- you know,
16 boilerplate language that Your Honor mentioned, and the
17 language concerning the equitable arguments for setting
18 aside the settlement agreement are certainly -- is certainly
19 language that we see in the Second Circuit and Your Honor's
20 aware of it.

21 I mean the April 15th order demonstrates that the
22 Court is aware that when there is a constitutional due
23 process violation that results in unique prejudice that
24 courts are bound to step in and craft a solution for that
25 litigant.

1 It's our position that Ms. Powledge, as she was
2 trying to grasp out the value of her claim before the
3 settlement, was doing just that, but she could not because
4 of the lack of documents that would have tended to prove her
5 claim.

6 Now, I haven't brought it up yet because I don't
7 want to appear aggrandizing, but the -- GM's arguments
8 concerning the wreck were that he did it on purpose, okay?
9 And the only reason why you would make that argument is
10 because the nature of the underlying wreck itself lends to
11 only one of two things. That he did it on purpose or there
12 was a massive failure in the vehicle.

13 Of course my client would never, never has, and
14 never will believe that her husband did this on purpose, and
15 that's what led her to believe that it was GM, certainly
16 what led her to file a lawsuit. But because of the
17 destruction of the vehicle she had no evidence really to go
18 off of to attempt to value or prove her claim because GM was
19 holding all the documents.

20 Now whether purposefully or the result of
21 corporate incompetence GM had the documents that if they
22 would have produced them would have allowed her to know the
23 real merit of her underlying lawsuit.

24 She, you know, filed a claim for 250 million, she
25 agreed in a capping letter to bring that down to 55 million.

1 Would she have done that if had a bunch of evidence that
2 demonstrated the likelihood that the wreck really was caused
3 by a product defect and she could prove it in court? That's
4 unlikely. Would she have at 55 million gone down to
5 2.7 million, just for her claim, if she had really great
6 documentation to demonstrate the merits and value of her
7 lawsuit? No, she would not.

8 And what the Spaulding case says and as we apply
9 it to this case is, of course, she would not, and we know
10 that, and of course this plaintiff, if provided that
11 evidence that the defendants had, would not have settled his
12 case for I think it was \$6,500.

13 They would require more if they're negotiating
14 based on that knowledge. Certainly, my client would have,
15 in negotiating in accordance with the ADR order, required
16 more than 2.7 million worth of warrants that she then
17 converted for a much lesser amount for the loss of her
18 family.

19 And so -- and now we're onto the -- you know,
20 talking about the settlement agreement and the merit of the
21 argument that we get the benefit of the settlement
22 agreement. We get to avoid Powlege's attempt to undo the
23 settlement agreement. Well, the Second Circuit says that
24 you do not; that -- I mean, and that is independent of 60(b)
25 and that is also a separate claim that Powlege has made

1 against the trust; that the settlement agreement was
2 attained through misrepresentation and she gets to avoid it.

3 Now 60(b) is a vehicle for attacking the
4 settlement agreement and certainly the settlement agreement
5 says that this Court can change it, modify it, upon your
6 order. We are not going to pay back Dover and Dover is
7 probably not going to even want to deal with us. I would
8 expect that even if we did that and the Court provides a
9 relief to Powlege, she wouldn't have to pay back what she
10 got from Dover to the trust. She would have to pay back the
11 value of the warrants as they existed in 2010 to the trust.

12 So I think -- and for the record and for counsels'
13 benefit, the Spaulding case was cited by the Supreme Court
14 of New Jersey as recently as 1998 for the very -- for the
15 very holdings that are contained within. And so, certainly,
16 at least the New Jersey Supreme Court -- and I've got that
17 cite as 154 NJ 437 and it's Kernan, K-E-R-N-A-N, v. 1
18 Washington Park, Urban Renewal Associates.

19 There's plenty of case law that doesn't follow
20 Spaulding. In fact, there's a very -- there's a long
21 opinion by the Fifth Circuit that takes issue with Spaulding
22 for a variety of reasons. But for -- I believe that the
23 Court's April 15th order and any relief provided to Powlege
24 can be -- can coexist easily.

25 The Court is -- has all the authority it wants to

1 be able to decide the 60(b) motion or to decide it on other
2 grounds, as the Court did in the April 15th order for the
3 economic loss plaintiffs. And certainly Your Honor went
4 into that; that you are entitled to do that.

5 I think that we do not dispute the assignment or
6 the sale of the claim at all, but the assignment itself --
7 and I have those documents and we talked about them, and
8 perhaps if the Court would like we could submit them for in
9 camera inspection. There's nothing about the documents that
10 would prohibit me from producing them if I was ordered to by
11 the court.

12 But nothing in the assignment documents, other
13 than the amount that the allowed claims were for, which is
14 public record, there's nothing in the assignment documents
15 that says we are being assigned your rights under the
16 settlement agreement. We, like as in all rights rather than
17 just the settlement amount for this now allowed claim is X
18 and you are assigning us that claim for that allowed amount.

19 And, of course, the transfer claim identifies the
20 capping amount, but everyone knew that the claim itself had
21 already been reduced based on the settlements and
22 stipulation agreement that was filed with the Court.

23 So I think she -- the point of the entire motion
24 and certainly of me being here is that she never got an
25 actual day in court in the sense that she was provided what

1 we would think of as a litigant's right to due process under
2 our rules of discovery, under our rules of civil procedure.
3 She did not get any documents. I mean -- and I cite to GM's
4 position in their mediation statement. Certainly, I've made
5 the point that GM accused Mr. Powlege of being a murderer of
6 his children because they did. That was their position.
7 And the only reason why they were able to take that position
8 was because they weren't producing the documents that would
9 have demonstrated the merit of her lawsuit in and her
10 product defect case.

11 I do not have to prove that underlying case today.
12 The GUC Trust in their briefing certainly makes it sound
13 like I do. That's not what is required. All I have to do
14 is prove to you that she was prejudiced by the conduct; that
15 there was some misrepresentations leading to the settlement
16 agreement, and that it needs to be voided for those facts.
17 And when we talk about prejudice we are talking about a
18 constitutional due process violation that specifically
19 prejudices her.

20 And, frankly, not -- and that's what -- and I'm
21 sorry to have offended Your Honor about the issue of the
22 other claimants, but if any claimant were to be in this
23 position, they should feel comfortable that they could come
24 to Your Honor and say, this is what happened to me and my
25 claim was undervalued because I didn't know this that they

1 knew. I should be able to get my claim back and to be able
2 to do it over with documents that should have been given to
3 me, but were not.

4 When we talk about, you know, certainly the
5 Bankruptcy Code and its provision, certainly a 393 sale,
6 those are incredibly beneficial provisions for a lot of
7 reasons. And we -- I mean, I'm not a bankruptcy attorney,
8 but I understand why they're there. But the tradeoff is
9 that the debtor must disclose, the debtor must say this is
10 what I'm coming to the Court with. I need -- I need Chapter
11 13, I need Chapter 11 help. I need this sale to be
12 effectuated, but here's all the stuff related to these
13 people that are going to be put out because they are
14 accepting lesser of what they would otherwise deserve if I
15 wasn't seeking bankruptcy protection.

16 In Ms. Powlege's case, for her claim, that
17 disclosure never occurred. For a lawsuit she never got
18 documents to prove her case. I mean, if it were a contract
19 dispute would she be entitled to --

20 THE COURT: Mr. Davis, I've let you talk for an
21 hour --

22 MR. DAVIS: Okay.

23 THE COURT: -- ten minutes. If you have anything
24 to tell me that you haven't already told me at least once
25 you can say it. But don't repeat things for the third or

1 fourth time, please.

2 MR. DAVIS: I don't. Not at this time.

3 THE COURT: Thank you.

4 All right. Who will I hear from next?

5 Ms. Rubin.

6 MS. RUBIN: Thank you, Your Honor.

7 And given Your Honor's comments earlier this
8 morning about your review of the briefs, I'm going to try
9 and keep my own comments brief, subject to any questions
10 that you have.

11 First, I would be remiss, Your Honor, if I didn't
12 say, as Your Honor has, to Mr. Davis and to Mr. Weintraub
13 how profoundly sorry I am for the tragedy that their client
14 suffered. As a parent, as a lawyer I think the
15 circumstances are unimaginable and certainly she has my
16 sympathies.

17 I will say, Your Honor, however, that that's not
18 what's at issue here. And what I would like to do is to try
19 and scale back on the rhetoric and the hyperbole and get
20 down to facts and law, if I may.

21 Your Honor, Mr. Davis was asked by you to talk
22 about the settlement and the transfer, and I would like to
23 concentrate most of my energy this morning on both of them.
24 And in particular a statement that Mr. Davis made about what
25 the impact was of the transfer and the impact of the

1 settlement, and I would like to look at both documents with
2 Your Honor if we may.

3 The first thing that Mr. Davis said was that the
4 transfer that was made by his client to Dover Master Fund
5 was essentially not everything that she had; that she had an
6 unliquidated, contested litigation claim and that what she
7 transferred to Dover Master Fund was just the reduction of
8 that claim to an allowed general unsecured claim.

9 And respectfully, Your Honor, based on my reading
10 of the documents that's simply not the case. So let's look
11 to the documents, Your Honor, if we may.

12 The settlement itself, on page 2 of the settlement
13 --

14 THE COURT: Pause for a second. Let me find it
15 again.

16 (Pause)

17 THE COURT: This is the stipulation and settlement
18 resolving claim number, and then there are --

19 MS. RUBIN: A series of --

20 THE COURT: -- four separate claims.

21 MS. RUBIN: Yeah. And, Your Honor, let me pause
22 there actually for one moment because I would like to
23 correct the record as to one misapprehension that I believe
24 the Court may have.

25 You see here listed four separate claim numbers.

1 Those four claims do not correspond to each of the deceased
2 Powlege children. Rather, they correspond to the claimants
3 themselves. Ms. Powlege, or Ms. Phillips, is the holder of
4 claim number 44614, which was filed in the amount of \$250
5 million and then subject to the agreed upon cap of \$55
6 million through the ADR procedures that Your Honor
7 referenced earlier.

8 That claim of \$250 million was in respect of her
9 wrongful death claims for the accident that killed her
10 husband and their four children together. The three
11 remaining claims that are referenced in the settlement here
12 are claims that belong, as Mr. Davis pointed out, to Mr.
13 Powlege's two adult children from a prior relationship and
14 to his mother.

15 And Your Honor will note that the claim amount
16 caps for those three remaining claims are only \$5 million as
17 compared with Ms. Phillips' claim, 44614, in the amount of
18 \$55 million.

19 It's my understanding, Your Honor, that Mr. Davis,
20 in coming before the Court with his Rule 60 motion, is
21 seeking to represent Ms. Phillips, but not the other adult
22 Powlege claimants. And I just want to clarify that for the
23 record. If I misunderstand that, certainly I hope Mr. Davis
24 will correct me and the record at a later point in time.

25 But going back, Your Honor, to the point I was

1 going to make, which is the whereas clause on page 2 of the
2 settlement agreement says, whereas claimants filed the
3 following proofs of claim, which it defines, therefore, as
4 the claims. And it refers to claim number 44614 in the
5 amount of \$250 million.

6 In the submissions that have been made to the
7 Court, one of the other parties it was -- it was not the GUC
8 Trust, actually submitted the proof of claim. That proof of
9 claim, 44614, is a reference to Ms. Powlege's lawsuit in
10 Texas. It's her wrongful death lawsuit in respect of the
11 death of her husband and her four minor children.

12 Your Honor, you know from the briefing and I won't
13 belabor this too much, that although the claims are then
14 settled, the claims meaning the proofs of claim with the
15 filed amounts listed and the claim amount caps listed, would
16 be settled as allowed general unsecured claims in specific
17 amounts that are written on page 3.

18 Paragraph 3 of the settlement then says -- I'm
19 sorry. Let me read paragraphs 2 and 3 because it will clear
20 up another issue. Your Honor asked Mr. Davis what happened
21 as the impact of the settlement, what distributions his
22 client would have been entitled to receive had he not
23 transferred the claim. And here's the answer, Your Honor.
24 The claimant shall receive distributions on account of the
25 allowed claims in the form set forth in and pursuant to the

1 terms of a confirmed Chapter 11 plan or plans in these
2 Chapter 11 cases.

3 So to answer Your Honor's question, had Ms.
4 Phillips not transferred her claim, yes, she would have been
5 entitled under the plan to become a GUC Trust beneficiary
6 and receive a distribution of new GM securities and to
7 receive GUC Trust units.

8 Now paragraph 3 of the settlement then says, upon
9 receipt of such distributions on account of the allowed
10 claims as set forth in the plan, the claims, not the allowed
11 claims, but the claims -- again, defined on page 2 as the
12 proofs of claim with the unliquidated final amount of \$250
13 million and the agreed upon cap of \$55 million in Ms.
14 Phillips' case, that claim shall be deemed to be satisfied
15 in full.

16 The briefing, Your Honor, that my client has
17 filed, that Mr. Steinberg's client has filed talks further
18 then about the impact of the release by reference to the
19 language in paragraph 4. I'll just mention that here and
20 move on to the evidence of the transfer of the claim.

21 Before today I personally had not seen the claim
22 sale agreement that was subject of a colloquy between you
23 and Mr. Davis, and I won't reference it further here except
24 to say that there is, in the public record, the evidence of
25 a transfer of a claim. I understand that document to have

1 been filed on the record in this case and something that all
2 the parties can refer to openly.

3 And let's -- let's go to the transfer of that
4 claim because Mr. Davis's contention is that by executing
5 this transfer, his client was somehow transferring away
6 something less than the whole of what she had prior to the
7 bankruptcy of General Motors.

8 And respectfully, Your Honor, I'll disagree. Ms.
9 Powlege is transferring here all rights, title and interest
10 in and to the claim of seller, including all rights of
11 stoppage and transit replevin (sic) and reclamation in the
12 principal amount of \$55 million defined as the claim. I
13 don't see that language anywhere to limit what is being
14 transferred to the allowed general unsecured claim amount
15 arrived at through the settlement agreement.

16 Rather, Your Honor, that is a wholesale transfer
17 of the agreed upon claim amount of \$55 million subject to
18 Your Honor's ADR procedures, which Mr. Davis has
19 acknowledged he is not challenging here. Your Honor asked
20 him specifically that question.

21 Further, in the next paragraph, Your Honor, the
22 seller acknowledges, understands and agrees and hereby
23 stipulates that an order of the Bankruptcy Court may be
24 entered without further notice to seller transferring to
25 buyer -- meaning Dover Master Fund -- the claim, the claim

1 in the amount of \$55 million, Your Honor, and recognizing
2 the buyer, Dover Master Fund, as the sole owner and holder
3 of the claim.

4 Now, Your Honor, in his brief, his reply brief in
5 particular, Mr. Davis takes issue with our characterization
6 of two cases and in particular cites the Bunk Arvay (ph)
7 case -- and I apologize if I'm bumbling the pronunciation in
8 the Southern District. He says those cases stand for the
9 proposition that under New York law one has to be specific
10 about the desire to transfer claims in tort, including fraud
11 claims.

12 Your Honor, the Abudabi (ph) case that's cited in
13 our brief does recite the rule of Fox versus Rothschild,
14 that's the New York case that I believe Mr. Davis is
15 referring to. But right after citing that general
16 principal, goes on to say that language transferring all
17 rights, title and interest to a claim is sufficient to
18 transfer to the assignee claims that lie in tort including
19 fraud.

20 Similarly, the Bunk Arvay case that Mr. Davis
21 cites, he cites a 1994 decision of the Southern District of
22 New York in which an assignee did not establish standing
23 according to Judge Ward because the language, similar to
24 that in this evidence of transfer of claim and similar to
25 that of the Abudabi case -- it's a Southern District case in

1 2012. According to Judge Ward in 1994, that was not
2 sufficient to transfer claims that lie in tort.

3 However, the Second Circuit disagreed a year
4 later. And while it did not find for the assignee on the
5 merits, it reversed the holding that Mr. Davis cited to you
6 on standing principals.

7 So, Your Honor, to circle back, while I am
8 certainly sympathetic to Mr. Davis's client and her plight,
9 indeed it is an unimaginable one for almost all of us in
10 this courtroom, as purely a matter of standing law, purely
11 on the basis of consultation to the documents and the case
12 law of this circuit and the district, I still fail to
13 understand Mr. Davis's position that his client has retained
14 something that she once had prior to GM's bankruptcy.

15 Your Honor, if I can continue for a moment. You
16 asked some questions about timing and I'm prepared to rest
17 on our briefs on the question of timing unless Your Honor
18 would like me to address that issue.

19 THE COURT: No. I don't think you need to, Ms.
20 Rubin.

21 MS. RUBIN: Okay. Your Honor, the one thing I
22 would say here is Mr. Davis said this morning that he's not
23 saying anything about intent and, respectfully, Your Honor,
24 we would disagree. Throughout his motion papers on this
25 motion, as well as papers he's filed in other courts it's

1 quite evident to the GUC Trust that Mr. Davis and his
2 client's submissions are all about fraud. You can see
3 paragraph 69 of his moving brief or even the transcript of
4 the October -- I'm sorry -- the August 18th, 2014 hearing
5 before this Court where Mr. Davis came before you and in
6 connection with the no stay pleading that he had filed told
7 the Court that he didn't want a stay so that his client
8 could pursue her fraud claim.

9 And I -- you know, from our perspective that
10 speaks for itself. The motion that he's making here as a
11 Rule 60(b)(3) motion, the law of the Supreme Court is clear
12 that where one submits a 60 motion -- a Rule 60 motion
13 that's premised on one of the grounds for relief enumerated
14 in clauses (b)(1) through (b)(5), one can't circumvent the
15 timing dictates of Rule 60(c) by characterizing one's motion
16 as a Rule 60(b)(6) motion. That's the -- again, the
17 Liljeberg case. I'll spell it, L-I-L-J-E-B-E-R-G at 486
18 U.S. 847. The pin cite is 863 and Note 11.

19 Mr. Davis says in his brief, Your Honor, and he
20 says it both, I believe, in his moving brief and again in
21 his reply that the Second Circuit has never held that a
22 60(b)(6) motion -- that's his preferred grounds for relief
23 -- it's never held that that kind of motion is untimely if
24 it's made within a year.

25 Mr. Davis is or may be technically accurate that

1 the circuit has never so far held, but there are a number of
2 lower court opinions in this circuit that hold even if Rule
3 60(b)(6) were the appropriate grounds for relief here -- and
4 respectfully, Your Honor, it's not for the reasons set forth
5 in the GUC Trust brief -- there are a number of cases, we
6 cite four of them on page 19 of the GUC Trust's brief,
7 suggesting that where a party sits on its rights for nine
8 months, ten months, periods of time under a year it's still
9 appropriate to deny Rule 60(b)(6) relief.

10 And then the final thing, Your Honor, that I would
11 say here is that Mr. Davis keeps acting as if there is a
12 demonstrated discovery misconduct here. He keeps saying
13 that our client or GM -- and he refers to GM loosely, Your
14 Honor. You'll note he refers to my client and Mr.
15 Steinberg's client repeatedly and collectively as General
16 Motors. I assure you Mr. Steinberg and I would both submit
17 to the Court that we are not one in the same. As Your Honor
18 noted, I represent creditors of old GM. I represent people
19 who in some circumstances may not be all that differently
20 situated, at least in terms of what happened prior to the
21 bankruptcy than Ms. Phillips herself. And I have a
22 fiduciary duty to them.

23 And as part of that duty I would like to point out
24 to the Court that in a Rule 60(b)(6) motion -- again, that's
25 Mr. Davis's avenue for preferred relief here -- this circuit

1 requires a showing of exceptional circumstances. He has a
2 burden of proof on that. It's not enough to make bald
3 assertions that there has been discovery misconduct.

4 Your Honor said earlier that you didn't believe
5 that either of Mr. Davis's opponents were taking issue with
6 the discovery misconduct. And, Your Honor, I'll refer you
7 to the GUC Trust brief because the back end of our brief
8 does, in fact, discuss the exceptional circumstances --

9 THE COURT: You're thinking I said what?

10 MS. RUBIN: I'm sorry. Your Honor, I understood
11 you to say that neither of Mr. Davis's opponents had said
12 anything --

13 THE COURT: No. What I said I -- was that I was
14 prepared to assume for the purpose of --

15 MS. RUBIN: I see.

16 THE COURT: -- the analysis that. I don't think I
17 can decide a disputed issue of fact of that character on
18 today's motion.

19 MS. RUBIN: Well, Your Honor, we would agree with
20 -- we would -- we might agree with that except to say, Your
21 Honor, that the burden of proof belongs with Mr. Davis. And
22 Mr. Davis very conveniently for him conflates in some
23 instances facts that this Court may have found with respect
24 to the ignition switch defect, with his theory of -- his
25 client's theory of liability on the underlying accident.

1 And what I would say is, Your Honor, Mr. Davis
2 came before the Court on August 18th of 2014 -- and, again,
3 in reference to the no stay pleading he told Your Honor that
4 it was inappropriate for his client to wait in line because
5 his client wasn't affected by the ignition switch recall.
6 He told Your Honor that the recall that he believed impacted
7 his client's husband's vehicle was the completely different
8 recall and that there was no Volucus (ph) report. There
9 were no congressional hearings. There was no public record
10 that would establish what --

11 THE COURT: That's the part you quote on page 9 of
12 your brief?

13 MS. RUBIN: That's correct. And, Your Honor, I
14 would also refer you to that same transcript at page 83.
15 Mr. Davis continues and reiterates many of those same themes
16 on page 83 of the transcript. The quote on page 9 of our
17 brief is from page 78 of the transcript.

18 But he told Your Honor that he needed that
19 discovery to pursue Ms. Phillips' fraud claim because it
20 wasn't clear what GM knew and when. Well, if that's the
21 case then Mr. Davis can hardly establish the exceptional
22 circumstances needed for Rule 60(b)(6) relief because, Your
23 Honor, that test as enunciated in the Old Carco decision and
24 many others of this circuit requires three things.

25 First, it requires supporting evidence that is

1 highly convincing. And the Second Circuit in the Coe
2 decision cited in our brief makes clear that unsubstantiated
3 allegations are not enough for Rule 60(b) relief. You have
4 to point to actual evidence, affidavits, documents.

5 And, respectfully, Your Honor, what Mr. Davis has
6 presented the Court with here are a series of discovery
7 requests, but with one exception: He never shows Your Honor
8 how Motors Liquidation Company or Old GM responded to those.
9 And, in fact, the one objection and response that he does
10 provide to the Court shows that Old GM took issue with the
11 relevance of the request that he was positing.

12 So Mr. Davis can stand up here, Your Honor, and
13 say GM didn't -- Old GM didn't comply with discovery
14 requests. MLC didn't comply with discovery requests. But
15 he hasn't put anything before Your Honor to suggest that
16 that was a knowing failure, a willful failure; that it was,
17 in fact, any failure at all. There could have been disputes
18 between the parties about what discovery requests were even
19 appropriate in the underlying litigation. But Mr. Davis
20 hasn't allowed the Court to make that determination.

21 The final thing I'll say, Your Honor, is Mr. Davis
22 seems to understand now that Rule 60 is not going to be the
23 panacea (ph) for what ails his client and has submitted in
24 his reply and in argument today that instead it was a due
25 process violation. Again, Your Honor, I fail to see how Mr.

1 Davis has established that his client's due process rights,
2 if his client is even still a party or party in interest to
3 the settlement, were violated. It's not clear to us how he
4 has satisfied that burden.

5 And, again, to the question of exceptional
6 circumstances and the supporting evidence, I would refer
7 Your Honor to our brief. We also point out, as Your Honor
8 has, that there's a prong of the exceptional circumstances
9 test that deals with undue hardship to others. For the same
10 reasons that we believe Mr. Davis's client's claim are
11 equitably moot, so, too, would reopening the settlement
12 cause an undue hardship to the existing creditors of the GUC
13 Trust.

14 I'm sure that Mr. Golden and others who stand in
15 position like his clients would take issue with the
16 characterization that they would be better off, for example,
17 if the settlement were reopened and folks like Ms. Phillips
18 were permitted to further litigate against the trust.

19 It's our position, Your Honor, as stated in our
20 brief in a footnote on pages 119 to 120 of the threshold
21 issues decision and again page 108 which makes clear that
22 the equitable mootness holding pertains to the pre-closing
23 accident plaintiffs applies equally to Ms. Phillips.
24 Indeed, Mr. Weintraub, in representing the pre-closing
25 accident plaintiffs at the threshold issues briefing

1 represented a class of people that included Ms. Phillips.

2 And then finally, Your Honor, with respect to the
3 Spaulding v Zimmerman case, I certainly will reserve our
4 right to further make a submission to the Court on that
5 case. I'll just say, Your Honor, even on the face of it, on
6 the basis of the very cursory review I was able to do while
7 listening to Mr. Davis's argument I'll say three things
8 about it.

9 Let's put aside its age for a second and accept
10 that it's still good law, which as Mr. Steinberg noted we
11 don't know. There are three things about that case that
12 make it wholly and opposite here.

13 One, there's no assignment.

14 Two, there is proof in this decision that the
15 defendants knew something that the plaintiffs did not.
16 Respectfully, Your Honor, there's a mismatch in Mr. Davis's
17 theory. Mr. Davis's client, as pointed out by both the GUC
18 Trust and New GM in their briefs, their vehicle at issue was
19 subject to one and only one recall. Mr. Powlege was driving
20 a 2004 Chevrolet Malibu Classic. That is not the same car
21 as the 2004 Chevrolet Malibu. It is a continuation of the
22 2003 Chevrolet Malibu, which was then discontinued, renamed
23 as the classic. The vehicle that from 2004 on forward
24 became the Chevrolet Malibu was a different car entirely
25 with a different model series designation. I'll refer to

1 the Court to Exhibits 19 and 20 to my declaration which
2 point that out,

3 There's no proof here that Old GM or MLC knew
4 something with respect to the specific requests posed to
5 them by Mr. Davis's client that it did not disclose.

6 And then third, unlike the Spaulding v Zimmerman
7 decision, the motion that Mr. Davis has made here
8 appropriately fits into Rule 60(b)(3), and I don't know what
9 the law of Minnesota is, Your Honor. I'll confess to you
10 I'm not an expert in Minnesota law by any stretch of the
11 imagination. But I do know enough to know that in this
12 circuit Rule 60(b)(3) has a time limit that's absolute. It
13 does not admit of any exception. It does not have a
14 discovery rule. We cite cases in our brief including the
15 Second Circuit's decision in Garvin that make that
16 absolutely clear. Spaulding versus Zimmerman, on the other
17 hand, deals with a 60(b)(6) motion.

18 And so for all three of those reasons it's not
19 clear to me why this decision, which is obviously not
20 binding precedent on this Court, even should have any
21 instructive impact.

22 And with that, Your Honor, I'll rest unless Your
23 Honor has any questions for the trust.

24 THE COURT: No. Thank you.

25 Mr. --

1 MS. RUBIN: Thank you.

2 THE COURT: -- Steinberg.

3 MR. STEINBERG: Your Honor, it's not often that I
4 can say this, but I'm sure I'm going to be the briefest one
5 here, and maybe it's because I'm last.

6 I did point out that with respect to the
7 settlement agreement that in the highlighted provisions that
8 Mr. Davis showed you that there were other provisions that I
9 would highlight to you.

10 Ms. Rubin went through some of the provisions of
11 the settlement agreement, but other were a couple of others
12 that I would like to be able to just point out to you.

13 One is the absence of any representations under
14 the settlement agreement at all with regard to any
15 substantive other than the parties had the authority to
16 execute the agreement. So there is no representations that
17 someone could say was a fundamental element of the
18 settlement that someone breached, at least as far as a
19 contractual matter.

20 Ms. Rubin pointed out paragraphs 3 and referred to
21 paragraph 4. I will note that -- and I think Your Honor in
22 its colloquy noted that the release provisions of paragraph
23 4 say they're releasing known and unknown claims. And I
24 will call Your Honor's attention to page 5 of Mr. Davis's
25 reply brief that says that the value of the settlement

1 agreement was completely unknown to Phillips. He basically
2 used the same words that are in the --

3 THE COURT: Forgive me. What was the second thing
4 you said after known and unknown --

5 MR. STEINBERG: On page 5 of the reply brief Mr.
6 Davis wrote the value of the settlement agreement was
7 completely unknown to Phillips. So he actually uses the
8 word unknown which was the specific thing that was released
9 in paragraph 4.

10 Paragraph 6 of the settlement agreement says that
11 the stipulation and settlement contains the entire agreement
12 between the parties as to the subject matter hereof and
13 supersedes all prior agreements and undertakings between the
14 parties relating thereto.

15 Well, what -- while that may be boiler plate
16 language, it is important language that everybody puts in
17 the settlement agreement so that the settlement is a self-
18 contained document.

19 Paragraph 8 says that each person who executes
20 this stipulation and settlement represents that he/she is
21 duly authorized to do so on behalf of the respective parties
22 hereto and that each such party had full knowledge and has
23 consented to this stipulation and settlement.

24 So there was another provision that basically said
25 that they're voluntarily doing it with full knowledge, and

1 then in bold at the end of the settlement agreement it says
2 that the undersigned's warrant that they have read the terms
3 of the stipulation and settlement, had the advice of counsel
4 or the opportunity to obtain such advice in connection with
5 reading, understanding and executing the agreement, and had
6 full knowledge of the terms, conditions and effects of this
7 stipulation and settlement.

8 THE COURT: Pause, please, Mr. Steinberg. What
9 about Mr. Davis's contention that New York Courts ignore
10 provisions of that character and let you blow away
11 settlements notwithstanding language of that character.

12 MR. STEINBERG: I'm not familiar with that law
13 that he was referring to.

14 THE COURT: All right.

15 MR. STEINBERG: The other thing that I would point
16 out to Your Honor on the assignment -- and I think Ms. Rubin
17 highlighted the relevant points. I would just point out
18 that the lead in to the assignment says that the assignment
19 is unconditional and irrevocable.

20 With regard to the settlement itself, it stands --
21 you know, I think it goes almost without saying that the
22 settlement was voluntary. And that the one thing that Mr.
23 Davis kept on saying about what Your Honor has to consider
24 for the broader aspects of this case, the one thing that he
25 didn't say, which I think is obviously relevant and

1 important, is that he was expounding a postulate that would
2 mean that no one would ever settle a case, meaning that I'll
3 settle now for whatever it is that I think I know and if I
4 come up with something or if there's a new fact or there's a
5 new development of the law or something else that I didn't
6 contemplate, then I'm going to ask for more.

7 And the reason why courts promote settlements is
8 for finality. And that's what parties achieved here,
9 finality of the transaction.

10 The -- I think Your Honor was clear and correct on
11 the Enron decision not being applicable here. I think when
12 Your Honor reads the Spaulding case you'll see that the
13 element of Spaulding that's most significant, it was a
14 settlement of a minor child and, therefore, there's a
15 different standard when new events take place that may
16 affect the minority of the child. And I think they were
17 citing to the law that relates to the minority of children.
18 So -- and the ability to look past the settlement if a minor
19 had had settled that turned out to be inappropriate for
20 other reasons. So we obviously don't have a minority child
21 here.

22 If Your Honor believes that further briefing is
23 necessary on this point, then we'll be happy to give it.
24 Mr. Davis himself said that the case that he was giving to
25 you, while maybe cited by a New Jersey court -- and I'm not

1 sure for what purpose with approval -- he was clearly saying
2 that there were cases that were criticizing this case as
3 well, including a Fifth Circuit opinion.

4 THE COURT: Ms. Powlege obviously isn't a minor,
5 but especially with the benefit of the clarification that
6 Ms. Rubin gave me, is part of the consideration that she
7 received, part of the bundle of the consideration that she
8 received in substance or at least in substance in part
9 compensation to her for the lost children or -- so I don't
10 know whether I should be looking at a recovery for a child
11 in terms of what it takes to take care of a child until the
12 child gets older or whether it's for the loss of the child.
13 I don't know exactly how to deal with that without further
14 clarification.

15 MR. STEINBERG: Your Honor, I don't know what the
16 underlying complaint said, but the settlement was the
17 underlying complaint. So whatever were the allegations
18 raised in Texas in 2007, that was the essence of the proof
19 of claim. It was they filed a proof of claim that
20 referenced the litigation and slapped the complaint on in
21 the back. What was settled was that claim. Whatever they
22 were asserting as a basis for a recovery for \$250 million,
23 that was what was settled.

24 THE COURT: Okay.

25 MR. STEINBERG: And there was no pointing out of

1 anything else but that.

2 THE COURT: I'm just confused. If I had -- it's
3 hard to talk about such personal tragedies in such
4 antiseptic terms.

5 But if you have a child who is injured but not
6 killed in a car wreck and part of an award is for the
7 benefit of the maintenance of the child, the kid's support,
8 the kid's education, the kid's inability to earn money once
9 he or she becomes an adult, I can see that as one kind of
10 claim. And if you're talking about the compensation to a
11 full adult for the loss of minors, that seems to me
12 potentially different. And I don't know how to analyze this
13 Minnesota case in terms of whether it's in one category or
14 the other or both.

15 But I guess if you can respond by a supplemental
16 submission you can clarify that distinction if it applies.

17 MR. STEINBERG: I can, Your Honor, but I think Ms.
18 Rubin has something to add on this.

19 THE COURT: Are you okay with yielding to her for
20 a second?

21 MR. STEINBERG: Yes, I am, Your Honor.

22 MS. RUBIN: Your Honor, certainly I was not
23 involved in representing Motors Liquidation Company at the
24 time of these proceedings, and my understanding is Mr. Davis
25 did not represent Ms. Phillips at the time of these

1 proceedings either. So I'm just solely going after -- on
2 the basis of documents.

3 However, Your Honor, Ms. Phillips, then Powlege's,
4 petitions in Galveston County, Texas, in seeking damages she
5 sought damages for physical injury and mental anguish to her
6 husband and her children saying that their injury survived
7 their death through their estates, and then also sued for
8 damages to herself with respect to her own loss of
9 companionship, loss of consortium, mental anguish, and loss
10 of inheritance of assets that each of them would have earned
11 had they survived the accident.

12 I don't see any of her claims, however, Your
13 Honor, to be claims that are in respect of what the costs of
14 caring for them, for example, through their reaching the age
15 of majority would be.

16 Is that responsive to your question, Your Honor?

17 THE COURT: Yeah. I think it does. Go ahead, Mr.
18 Steinberg.

19 MR. STEINBERG: Your Honor, just one final point,
20 and Ms. Rubin will -- talked about it and it is in her brief
21 and in our brief as well, too. The thrust of the entire
22 papers that Mr. Davis had as to what he thought went wrong
23 was a citation to a recall that didn't apply to her car.
24 And that they cited to the Chevrolet Malibu and not the
25 Chevrolet Malibu Classic. And the recall for the Malibu was

1 for a totally different part and a totally different type of
2 problem.

3 The only recall that applied to the Malibu Classic
4 was an ignition switch issue, not a brake failure or an
5 electrical failure, and it wasn't even the same ignition
6 switch type issue that applied to the earlier recalls which
7 were the subject of the factual stipulations.

8 So when you actually parse through the litany of
9 papers that Mr. Davis has filed in this court, it has
10 inconsistent theories based an obvious mistake of fact. And
11 the only reason why I point that out to Your Honor is I
12 think Your Honor was correct that there is no real order for
13 you to vacate because no one asked you to do anything. But
14 under 60(b)(6) the three part test as to what the Court has
15 to look to is whether he's presented convincing evidence,
16 and he -- the issue is, is that I don't think he's presented
17 any coherent theory, but certainly not convincing evidence
18 that merits as the exceptional circumstances of --

19 THE COURT: You said the ignition switch issue was
20 a different issue. Is it the same ignition switch that was
21 put --

22 MR. STEINBERG: No.

23 THE COURT: -- in the -- the -- I think it was --
24 at the outset of the April 15th opinion I talked about the
25 models that I understood to be the subject of the main

1 ignition switch controversy. This is a different --

2 MR. STEINBERG: This --

3 THE COURT: -- ignition switch in a different car?

4 MR. STEINBERG: Yes. The ignition switch that
5 involved with the Malibu Classic, the recall was because of
6 -- was caused primarily because of the location of the
7 ignition switch, not because of the torque, which was the
8 underlying part of the original, and that the fix that was
9 done in the recall was a totally different fix. It wasn't
10 the replacement of the ignition switch itself. It was to
11 change -- it was a systems issue that changed the insertion
12 for the key, but not the replacement of the switch itself.

13 So it's a different -- different issue at all and
14 it was a different basis for the recall.

15 THE COURT: All right. Thank you.

16 Mr. Davis, I'll take reply, but you want to yield
17 to Mr. Weintraub for a minute.

18 MR. WEINTRAUB: For just one minute, Your Honor.

19 THE COURT: Come to the -- a mic that I can hear
20 you better on, please, Mr. Weintraub.

21 MR. WEINTRAUB: Just briefly, Your Honor, I was
22 reading something else, but I thought I heard Ms. Rubin say
23 at one point that I had represented a group of which Ms.
24 Powlege --

25 THE COURT: Mr. Davis's clients were one of your

1 guys.

2 MR. WEINTRAUB: Right. And that is not the case
3 to the extent that Ms. Powlege is not claiming an ignition
4 switch defect as defined in the stipulated facts and as
5 addressed in the Court's decision. There were no arguments
6 made and no stipulated facts with respect to anything other
7 than the ignition switch as defined in the stipulated facts.

8 THE COURT: Would the corollary of that be and the
9 reason you got up be, other than as -- generally as an
10 officer of the court, are we not talking about res judicata
11 on Ms. Powlege? It's just stare decisis.

12 MR. WEINTRAUB: To the extent it is stare decisis,
13 yes, it's not res judicata and I'm not sure that anything in
14 the Court's decision addressed the due process issues with
15 respect to any presale accident claimants other than people
16 who complained of the ignition switch defect as defined in
17 the stipulated facts.

18 THE COURT: Fair enough. Okay.

19 MR. STEINBERG: Your Honor, just on that point,
20 just very briefly, that is a -- an issue that may come up
21 when the judgment is presented. I conserved all that.

22 THE COURT: Okay.

23 MS. RUBIN: Your Honor, to --

24 THE COURT: Pull the mic again close to you --
25 you, please, Ms. Rubin.

1 MS. RUBIN: I'm sorry. I'm very seldomly the most
2 soft-spoken person in the courtroom or at least soft-spoken.

3 Your Honor, just to clarify my earlier comments,
4 it's my understanding as the GUC Trust presents in its brief
5 that the vehicle that was being driven by Ms. Phillips'
6 husband, Mr. Powlege, is subject to one recall and one
7 recall only. We have presented Your Honor with evidence as
8 exhibits to my declaration in response to -- to Ms.
9 Phillips' brief demonstrating that when you run the vehicle
10 ID number through both GM's site and the NHTSA site the only
11 vehicle recall that is pertinent to that vehicle is one, as
12 Mr. Steinberg pointed out, dealing with the ignition switch.

13 It had long been my understanding that to the
14 extent that Mr. Weintraub represents pre-closing accident
15 plaintiffs with ignition switch issues, and Ms. Powlege
16 mentions the ignition switch defect in her underlying
17 lawsuit that she seeks to pursue should her settlement be
18 vacated, that Mr. Weintraub does, in fact, represent Ms.
19 Phillips in that regard. There can be a debate, I guess,
20 about what Ms. Phillips' claims are. That's obviously for
21 Mr. Davis to clarify and not for me. But it had long been
22 my understanding that to the extent that she is alleging
23 claims based on the ignition switch defect, she was, in
24 fact, represented by Mr. Weintraub in the threshold issues
25 briefing and hearing.

1 Thank you, Your Honor.

2 MR. WEINTRAUB: Your Honor, I need to respond to
3 that. I'm sorry.

4 THE COURT: I could let you and ultimately, if you
5 push me I will let you, Mr. Weintraub.

6 But doesn't this ultimately involve the extent, if
7 any, to which there is a res judicata claim or for that
8 matter a stare decisis claim with respect to an issue that
9 hasn't been put before me, which is whether she's the victim
10 of an ignition switch problem and of the old type, if I can
11 call it that, and isn't today's show all about standing and
12 60(b) relief?

13 MR. WEINTRAUB: That's correct, Your Honor. And I
14 was not the one that wandered into this area during oral
15 argument, but I happen to be sitting here and since I was
16 the attorney referred to by name I need to respond.

17 THE COURT: Let me ask everybody in the room, can
18 I skim the snatches (ph) by giving you guys reservations of
19 rights on an issue that may or may not come up down the
20 road?

21 MR. WEINTRAUB: That's fine, Your Honor.

22 THE COURT: How about for you, Mr. Steinberg?

23 MR. STEINBERG: That would be fine.

24 THE COURT: Or for you, Ms. Rubin?

25 MS. RUBIN: Yes, Your Honor. Thank you.

1 THE COURT: Okay. Let's get back to your reply,
2 Mr. Davis.

3 MR. DAVIS: Thank you, Your Honor.

4 With regard -- I'm going to try to work backwards.

5 Concerning the ignition switch, the control module
6 and the cruise control defects a couple of things.

7 Number one, counsel's incorrect. It was discussed
8 in the underlying litigation in multiple depositions, which
9 I have but have not provided to the Court because of the
10 stay discussion we had in August of last year in which no
11 discovery was to be done. So I'm happy to supplement with
12 those depositions from experts, both GM and plaintiff's
13 expert concerning the underlying vehicle, the Malibu, the
14 Malibu Classic, and whether it had a control module
15 applicable or similar to the one that is the subject of
16 multiple recalls or not.

17 The same with the cruise control. In fact, it
18 did. It is generally true and it was understood at the time
19 that it was generally true that the 2003 Malibu became the
20 Classic. This particular Classic did have these control
21 modules as opposed to a drive by wire system, something I
22 didn't know until I actually got documents from former
23 counsel of Ms. Powlege. So contrary to counsel's
24 representations, I am happy to provide that deposition in
25 which the control module was discussed, certainly the cruise

1 control.

2 But setting that aside; that is, what is the
3 underlying vehicle, product defect cases of this kind are
4 circumstantial. The fact that there were defects that
5 result in occurrences of the kind that the Powlege vehicle
6 we know produced, i.e. no brake lights, uncontrolled speed,
7 an inability to brake, if you're going to assume that the --
8 that the driver did not intend to crash the vehicle, then we
9 would draw from all of the documents related to similar
10 makes and models and what those documents and recalls say
11 about the potential for those recalls and the known defects
12 to have been applicable to the subject vehicle in this
13 particular crash on this particular day.

14 I didn't want to get into the discussion of the
15 underlying wreck simply because we're not there yet. I'm
16 just saying she should have gotten these documents. And
17 it's very difficult to appreciate counsel's argument that --

18 THE COURT: Well, pause, please because Ms. Rubin,
19 as I understood her argument, especially when she flushed it
20 out orally, was arguing something a little different.

21 If -- she corrected me on my original statement --
22 nicely corrected me, but corrected me that I said I was
23 prepared to assume there was a discovery violation. She has
24 raised the issue, not so fast, Judge. Don't necessarily
25 assume that.

1 It may be that whether or not I assume it I have
2 to assume that there's at least an issue of fact on whether
3 there was a discovery violation or not. But she's saying
4 something different. She's saying that in order to get
5 60(b)(6) relief, or for that matter 60(b)(3) relief, you
6 have to at least put something on the table that suggests
7 that there was a fraud, and she's accusing you -- accusing
8 you also nicely, but saying that you failed to put forward
9 any facts from which the inference of fraud could be
10 inferred and admittedly asking for discovery as to whether
11 or not there was a fraud is insufficient.

12 And I would like you to respond to that aspect of
13 her argument on two levels: One, whether she's right on the
14 law and, two, whether, assuming she's right on the law, that
15 you have shown facts from which I could draw an inference of
16 fraud on your vehicle as contrasted to anything that might
17 be found with respect to vehicles subject to the April 15th
18 decision.

19 MR. DAVIS: Sure. First, and it's quick, she's
20 correct on the law. Okay.

21 Number two, while being right on the law she's
22 incorrect in terms of how she characterizes the documents in
23 -- and this is, Your Honor, respectfully, why I was saying
24 at the time in August I wanted to be able to conduct some
25 discovery was to help me make this motion or certainly make

1 this issue easier.

2 But even if we only look to the report that we
3 have and the documents that are now publicly available, we
4 know that there were -- and we in the motion certainly go
5 through all of the instances in which GM, well prior to
6 August 2010, certainly well prior to June 2009, was aware of
7 a number of product defects for cars similar to or have
8 certain components that are identical with this subject
9 vehicle, and that those documents existed for many years
10 preceding June 9th, 2013 -- excuse me -- 2009, and that had
11 been sought through the specific discovery requests that we
12 made.

13 And, you know, Counsel references the objections
14 that were offered by GM at the time, Old GM at the time.
15 Without addressing those particular objections or the merits
16 of those objections, I would just respectfully offer to the
17 Court that if a plaintiff is making a product defect claim
18 in which they are assessing -- they are arguing that the car
19 was uncontrolled in terms of speed and they seek documents
20 related to cruise control, that it couldn't brake, and they
21 seek documents related to braking and they then seek
22 documents related to the ignition switch, for those -- for
23 that particular model vehicle and those within its class,
24 and the documents that we know about are not then produced
25 by GM at the time, but then rather than producing those

1 documents GM takes the affirmative defense that the driver
2 committed murder/suicide, I would just respectfully say that
3 that is pretty extreme.

4 And, of course, so -- and she's not wrong on the
5 law, but I'm saying that with our particular facts we've
6 demonstrated requests that were really made, and we provided
7 all of those requests for the Court. Certainly, litigants
8 make objections. But there's still an affirmative duty to
9 produce responsive documents, setting aside your objections,
10 so long as those documents are relevant and discoverable.

11 We know that documents were relevant and
12 discoverable. We know, despite counsel's representation
13 about and the, you know, VIN number, all of that was
14 discussed and I'm happy to provide the Court with those
15 depositions and those expert reports if it's going to
16 ameliorate any concern the Court has about the specifics of
17 the discovery request being applicable to this subject
18 vehicle.

19 THE COURT: You know, I'm thinking that might be
20 useful, Mr. Davis, because if you and she agree on the law,
21 then either under those cases or in addition Bell Atlantic
22 and Ashcroft, the question that arises to a judge is do I
23 have a showing of evidentiary facts from which I can get
24 into the satisfaction of that requirement.

25 If you can show me that either by stuff that

1 you've already pleaded or stuff that you could plead in
2 reliance on the depositions, and after your opponent has had
3 chance to respond to that, that would help me in doing my
4 job.

5 MR. DAVIS: I will absolutely do that, Your Honor.

6 THE COURT: It goes without saying that your
7 opponents would have to have the opportunity to reply --

8 MR. DAVIS: Absolutely.

9 THE COURT: -- or respond. I don't think I need a
10 three-way back and forth. But I would -- I think that would
11 help me because if I heard her right you haven't yet shown
12 that. And if I heard you right, you disagree with her.

13 MR. DAVIS: Well, I would say that our pleadings
14 are sufficient in terms of the allegations. And she
15 references some transcript testimony. I -- I don't know
16 yet, because I haven't gotten to get real discovery done,
17 what we --

18 THE COURT: The --

19 MR. DAVIS: Right.

20 THE COURT: But the problem is that there is a
21 zillion cases in the Rule 8 and Rule 9 area that say you
22 can't put out a complaint and say I hope to later prove it
23 by discovery.

24 MR. DAVIS: No.

25 THE COURT: You've got to have shown something

1 from the get go.

2 MR. DAVIS: I -- I absolutely agree with you, Your
3 Honor. But given that this is a product defect case -- if
4 we're talking about the underlying case it's a product
5 defect case based on negligence. Rule 9 doesn't apply, not
6 that -- the underlying case is not a fraud case. The
7 underlying case is a negligence case based on a product
8 defect. So the -- those particular rules are not going to
9 be applicable to being -- to saying I was prejudiced in
10 presenting my product defect negligence claim because I
11 didn't get documents that if I had them would have allowed
12 me to prove my claim and disprove your affirmative defense.

13 THE COURT: I hope you didn't misunderstand me.
14 You're asking for relief from a settlement agreement based
15 on an allegation of fraud. And what I need from you is --

16 MR. DAVIS: I understand.

17 THE COURT: -- what you have alleged to give me a
18 foundation upon which I can find --

19 MR. DAVIS: Okay.

20 THE COURT: -- the existence of a fraud.

21 MR. DAVIS: I'm sorry. I did -- I did
22 misunderstand, but now I understand. Thank you, Your Honor.

23 THE COURT: Okay.

24 MR. DAVIS: And then working back from New GM's
25 arguments regarding the Second Circuit's, I just want to

1 provide the Court the actual cites that we do cite into in
2 our reply brief.

3 First is the Playboy Enterprises case from 2004.
4 It's 2004 Westlaw 626807 and the page cite is at page 4.

5 THE COURT: What was the page cite on that 2004
6 Westlaw?

7 MR. DAVIS: Page 4. And that case cites to a much
8 dated case, but the case is directly on point and is citing
9 to this case approvingly. And that case is the Seneca Wire
10 and Manufacturing Company v AB Letch (ph) case, 247 N.Y. 1
11 and it's page cite 7 through 8.

12 THE COURT: What -- I practiced law in New York
13 long enough to know that if it's a 247 New York it may have
14 -- might be long in the -- what year is it?

15 MR. DAVIS: It's 1928, Your Honor, and I
16 respectfully call it mature precedent. I had the
17 unfortunate occasion where I called precedent old and the
18 judge --

19 THE COURT: Not if it's from the --

20 MR. DAVIS: -- in that particular case was born in
21 the same year so --

22 THE COURT: -- New York Court of Appeals. If it's
23 not overruled I'll recognize it that it's still --

24 MR. DAVIS: Well --

25 THE COURT: -- rule authority. I just wanted to

1 get some better context.

2 MR. DAVIS: So the quote from Playboy Enterprises,
3 which is a 2004 case, is -- and it was affirmed, by the way,
4 by the Second Circuit and that affirmance is 135 Fed. Appx.
5 479.

6 UNIDENTIFIED SPEAKER: Summary opinion.

7 MR. DAVIS: Correct. Parties -- "A party's
8 manifest" -- and this is quoting from the second restatement
9 of contracts -- "A party's manifestation of ascent -- when a
10 party's manifestation of ascent is induced by either a
11 fraudulent or a material misrepresentation by the other
12 party upon which the recipient is justified in relying, the
13 contract is voidable by that recipient."

14 And that's just exactly what we're saying in the
15 lead up to the settlement agreement; that there was a
16 misrepresentation. And then with regard to it -- it just
17 needs to be a misrepresentation as opposed to --

18 THE COURT: Well, pause, please, Mr. Davis.

19 You learn that in the first year of contracts or
20 torts or both. But the question that's the more
21 sophisticated and difficult one for a guy like me is whether
22 that generalized principal applies when you have disclaimed
23 reliance, when you have said in baby talk that you're giving
24 away claims known and unknown, and whether you have stated
25 at least once, perhaps twice in the agreement, that you know

1 everything you need to know to enter into the agreement.

2 I would find it more helpful if you called my
3 attention to cases that apply the restatement in a more
4 generalized principal that you articulated to me to
5 situations of the latter category where you have two or
6 three or four of those disclaimers.

7 MR. DAVIS: Sure. That case is -- well, here's
8 one, Congregation -- and I'm going to really mispronounce
9 this name so I'm just going to spell it, M-I-S-C-H-K-N-O-I-S
10 Leviere Yackoff (ph), Inc. v Board of Trustees, and it's 301
11 Fed Appx. 14 at page 6, and that's a Second Circuit opinion
12 from 2008. And the quote is simply, "To be sure so ordered
13 settlements have been held to be void on a Rule 60(b)(4)
14 motion where the settlement under the -- in the underlying
15 proceedings were fraught with serious irregularities which
16 indeed amount to a violation of the due process rights of
17 one of the parties.

18 That is that case, Your Honor. And in -- and that
19 quote I think effectively summarizes our position, which is
20 the underlying proceedings were fraught with irregularities.
21 We can only discover and have good litigation if the party
22 we are engaged in with discovery is adhering to the rules,
23 and we are saying the documents we were seeking were not
24 produced. Certainly, it follows a pattern that was in
25 existence prior to 2014. And we should have had those

1 documents in order to value the case before it was settled.
2 And that cite that I provided the Court and is in our reply
3 brief says that when -- when you do not have that, you can
4 void the settlement agreement.

5 With regard to the timeline and timeliness, I
6 don't want to get into a discussion of the -- certainly
7 there's allegations of fraud, but for purposes of this
8 motion we are just offering in the alternative that we are
9 saying documents were not produced that should have been.

10 The original filing that begat all of the filings
11 that came after was actually a petition for a bill of review
12 filed in Texas State Court. So counsel's argument about
13 sitting on this --

14 THE COURT: Forgive me. I'm not that familiar
15 with Texas civil procedure. What's a bill of review?

16 MR. DAVIS: It's a -- it's an equitable bill of
17 review. We still have them. Rule 60(b) was designed to
18 replace bills of review. In Texas we still have just a bill
19 of review. But it is essentially seeking the same relief to
20 undo a judgment order or settlement because of usually new
21 -- newly discovered evidence or something, fraud, something
22 to that effect.

23 But the original petition and bill of review in
24 State Court was filed very shortly after New GM began to
25 make its disclosures regarding the recalls. And so

1 counsel's suggestion that somehow we sat on our 60(b) motion
2 for nine or ten months and there are cases that say even
3 under 60(b)(6) that that's -- that's not okay, from the get
4 go both New GM and the trust were aware that Phillips was
5 seeking to undo the settlement agreement. And her petition
6 certainly identified that and sought that -- and sought that
7 legal relief.

8 Also on timeliness, I will point out the In re:
9 Lawrence decision from 2001, a Second Circuit opinion. That
10 case is very -- it's very good for our position. The
11 plaintiffs in that case originally sought 60(b)(3) relief
12 and got it. Then some years later, and I think based on the
13 timeline of the opinion it looks like over two, maybe three
14 years later, we brought a new affirmative action concerning
15 that prior settlement and the 60(b) relief.

16 The Second Circuit in In re: Lawrence completely
17 -- did not even address the gap in time that was apparent
18 from the recitation of the facts when it converted their
19 petition to a 60(b) motion and clearly found for the
20 plaintiffs based on fraud.

21 Now it is an opinion that -- I'm very aware of the
22 opinions in the Second Circuit that creates an absolute bar
23 after one year. But In re: Lawrence does not do that. It
24 did find in that particular case sufficient circumstances to
25 not apply that -- or to not take issue with that timeliness

1 argument.

2 I will just say that 60(b) as a procedural rule is
3 procedural. It's not substantive. But the rule was
4 designed to replace equitable bills of review and certainly
5 the equity arguments of this motion are what we rely upon.
6 There are a million ways in which the Court could find in
7 favor of the trust, in favor of New GM regarding plaintiff's
8 motions legally.

9 But there are very real ways and real authority
10 the Court has to find for Phillips and Powlege based on the
11 facts that we're presenting here, based on the authority you
12 have as an equitable court under 105, based on the equitable
13 remedy that we just seek under 60(b), based on the Court's
14 inherent ability to remedy what -- what was been a due
15 process violation that prejudiced Powlege's ability to
16 assess her claim.

17 And, Your Honor, I'm almost done. I -- one of the
18 undercurrents of the argument that the loan -- Loanacre
19 assignment argument creates is that somehow Loanacre would,
20 in being assigned the lawsuit, somehow have the ability to
21 step into Phillips' shoes today to try to undo the
22 settlement based on our arguments, and that's illegal. You
23 can't do that.

24 So we can't read the assignment as doing that
25 because that would be, you know, a -- a person cannot sell

1 in New York and in Texas you cannot sell your right to a
2 tort or a claim of fraud to another or have them finance
3 that case and have them obtain a -- obtain the benefit from
4 that lawsuit. And there are obvious public policy reasons
5 for that, but that sort of assignment argument does get into
6 that and -- and that's illegal.

7 So I would respectfully suggest that perhaps if
8 the Court's going to rule against Phillips, that may not be
9 the effective -- effective way to go because it's illegal.
10 You can't do that.

11 And then I heard counsel say she gave away what
12 she had. The whole argument is about what she didn't know
13 she had. And there is -- there was no way for her to know
14 because -- and you saw this in some of the documents that
15 are part of the record. GM was making the case that there
16 are absolutely zero recalls applicable to this car, any
17 other car like it that could have created the defects that
18 she's complaining of.

19 Well, they couldn't make -- they could make those
20 statements in 2010, but they simply cannot make those
21 statements today. As much as they might not be aware of the
22 particular make up of the -- of this -- of this subject
23 vehicle, I think everyone can agree that there were --
24 there's been plenty of recalls for Malibu's that resulted in
25 defects of the nature that Powlege's petition complained of,

1 certainly of even other cars, the Pontiac's G6 for example,
2 other vehicles within the class that Powlege was seeking
3 discovery of. We didn't get those documents. So how can
4 she know what she's -- what she has and what's she settling
5 if she does not have those documents.

6 And I'm -- I'm almost done, Your Honor. I -- if
7 the Court -- and I know that the Court asked what relief
8 would we actually be seeking, what could you do. I'm
9 actually going to defer to Mr. Weintraub because I think he
10 could probably explain with a better specificity than I can
11 what the Court could actually do in order to provide
12 Phillips with relief.

13 THE COURT: Well, I probably know as well as Mr.
14 Weintraub what I can do. I -- you can help me in telling me
15 what you want me to do.

16 MR. DAVIS: Okay. To void the settlement
17 agreement and if that means that Phillips is ordered to
18 compensate the trust for some amount equivalent to the
19 figure that she resolved her claim for in the settlement
20 agreement, of course, and, I mean, I would hope that we
21 could get some time to --

22 THE COURT: Are you tendering back a payment on
23 behalf of a person who I'm sure is not one of the one
24 percent in this country of over a million bucks?

25 MR. DAVIS: No, Your Honor. I -- without getting

1 into how that payment might be made, I can appreciate that
2 the Court, in voiding the settlement agreement, would want
3 to -- or you could say that in the likelihood that there's
4 some subsequent or future settlement or judgment in the
5 future, it would be treated as a credit and if there's not,
6 at that point it would need to be paid. I don't know.

7 But that the settlement agreement would be void;
8 that Phillips could have her adversarial proceeding, be able
9 to conduct discovery. And I would point out in the
10 practicalities of this, Your Honor, that the trust and/or
11 New GM, whatever entity is going to be required to pay some
12 amount of money in the future, the cap on their exposure is
13 35 million. After 35 million there is coverage, insurance,
14 that the claim would be subject to that would provide a
15 backstop with respect to what impact is this particular
16 claim going to have on other claimants and all of that.

17 There is a backstop so that it -- in the event
18 that it's above 35 million, that is the most that any GM --
19 that the GM trust would be exposed to or any other party
20 would be exposed to because of that umbrella policy of
21 insurance.

22 But that's really it, Your Honor, that we would be
23 able to avoid that settlement agreement and -- and get an
24 opportunity to litigate her case fairly, get documents and
25 present evidence. And if nothing else -- and if nothing

1 else comes of this to put an end once and for all to the
2 idea that the wreck could have been anything other than the
3 car malfunctioning, like Mr. Powlege killing his children.

4 And I -- I emphasize that only because I know that
5 that is my client's supreme personal interest; that she be
6 given the opportunity to demonstrate legally that that --
7 that affirmative defense is not correct; that there are
8 documents to demonstrate he didn't do it on purpose; and
9 that it was a product defect. And, certainly, that doesn't
10 involve any money.

11 But that's what we would like from the 60(b).

12 THE COURT: All right. Does that complete your
13 argument? I do have one question. Have a seat for a
14 second, Mr. Weintraub.

15 Does that complete your argument, Mr. Davis?

16 MR. DAVIS: Yes, Your Honor.

17 THE COURT: I do have one question. Relevant to
18 something I said before, we're -- I'm not sure whether or
19 not I was too accommodating too quickly.

20 If you had deposition testimony that you thought
21 could support the requirement under 60(b) doctrine that you
22 present court -- facts to a court indicating the presence of
23 flawed and you didn't already rely on them in the papers you
24 submitted to me, what is the basis upon which I should take
25 them now? You've given your opponents a moving target.

1 MR. DAVIS: Well, I -- respectfully, Your Honor,
2 having been here for the two days worth of argument in
3 February and certainly having appreciated the Court's April
4 15th order, the Court laid out what is a fair assumption;
5 that documents were withheld for many years by many people.

6 THE COURT: That was with respect to something
7 where there was a stipulation entered into by very capable
8 lawyers as to what 24 people knew with respect to a
9 different defect.

10 Now --

11 MR. DAVIS: I did not --

12 THE COURT: -- but to what extent do you have
13 stipulations from your opponents vis-à-vis the failure that
14 you're basing your claim for relief on?

15 MR. DAVIS: Frankly, Your Honor, our pleading and
16 certainly our motion, we are asserting what is accurate
17 which is that the control module, the cruise control and the
18 particular ignition switch already referenced, that all of
19 those things were present in the vehicle. I, in their
20 response, appreciate that they're disputing that now. But
21 there is -- appreciating there was not going to be any
22 discovery based on the prior, you know, discussion in August
23 of 2014, I -- this is not an evidentiary hearing. If the
24 Court would like this evidence --

25 THE COURT: Of course it's not an evidentiary

1 hearing, but the way evidentiary hearings work in the
2 federal courts on contested matters subject to Rule 9014 as
3 an adversary proceedings that go by the federal rules, and
4 specifically Rules 8 and 9, is that you get to an
5 evidentiary hearing if and only if there are material issues
6 of fact and the Court takes allegations as true only if they
7 comply with the obligation to put forth some factual
8 allegations of underlying evidentiary facts from which a
9 Court can make a non-conclusory finding. We learned this --
10 well, we didn't learn it in our first years of law school,
11 but this was long after I went to law school. But it's
12 pretty (indiscernible) or am I missing something?

13 MR. DAVIS: Your Honor, I -- our motion lays out
14 -- I believe that the motion lays out the contentions for
15 the plaintiffs concerning the subject vehicle. I -- when
16 the Court brings up Rule 9, for example, the Court presumes
17 the facts to be true in the plaintiff's complaint. Rule --

18 THE COURT: The non-conclusory allegations. It
19 takes evidentiary facts to be true. This is Ashcroft. It
20 says it in baby talk.

21 MR. DAVIS: I appreciate that, Your Honor. I
22 just -- to the -- well, I didn't know that -- I am happy to
23 provide the documents I previously referenced to demonstrate
24 that I am being correct, that I am correct when I make a
25 representation about the subject vehicle having a control

1 module.

2 So I would hope as an officer of the court that
3 these statements that are based in fact are taken for what
4 they are. I truly didn't know that -- I was -- I did not
5 see this as a motion designed to argue the underlying case,
6 just about whether or not she should get another shot
7 because of the settlement agreement being obtained --

8 THE COURT: Whether you're not entitled to Rule
9 60(b) relief based on fraud, either upon an appointment or
10 (indiscernible).

11 MR. DAVIS: But the fraud that we're complaining
12 of is the litigation and not getting documents in the
13 litigation.

14 THE COURT: Yeah. I understand that.

15 MR. DAVIS: Right. And so again, I -- it seems
16 that -- I'm trying to appreciate the Court's discussion
17 about the underlying lawsuit and the subject vehicle from
18 that lawsuit impacting the question of whether or not the
19 discovery requests that had been provided to the Court were
20 not responded to appropriately as they should have been in
21 order for Phillips to value her claim prior to settlement.

22 THE COURT: Okay. Mr. Weintraub, did you have
23 something you wanted to add briefly?

24 MR. WEINTRAUB: Yes, Your Honor. I only wanted to
25 make the point that I think Mr. Davis was deferring to me

1 on. The Court had asked whether or not there -- there's an
2 order of judgment that would be the subject of the Rule
3 60(b) motion and we think that there is. There's an
4 overarching order in the case with respect to settlements.
5 That order was activated or implemented with respect to
6 Powlege at the point in time that she entered into the
7 settlement agreement, and that settlement agreement was
8 entered into pursuant to authority granted by that order.

9 THE COURT: Well, you're surely -- you're not
10 telling me that I should (indiscernible) the authority?

11 MR. WEINTRAUB: Yes, I am, Your Honor. I think --

12 THE COURT: It did say that New GM doesn't have
13 authority to enter into settlements?

14 MR. WEINTRAUB: It doesn't have authority to enter
15 into this settlement agreement because this settlement
16 agreement was based upon --

17 THE COURT: I said New GM. I meant Old GM.

18 MR. WEINTRAUB: I'm sorry, Your Honor. I heard
19 some commentary --

20 THE COURT: Well, I should have -- maybe I should
21 have said the GUC Trust. But you're saying that I should
22 deny Old GM's authority or the GUC Trust's authority to
23 enter into settlements or I should deny it the authority to
24 enter into settlements only with respect to Ms. Powlege?

25 MR. WEINTRAUB: Neither, Your Honor. What I'm

1 saying is that authority should be revoked upon the showings
2 made that there was fraud in connection with the entry into
3 this settlement.

4 THE COURT: Revoked with respect to who and what?

5 MR. WEINTRAUB: With respect to the authority --
6 revoke the authority of General Motors to enter into this
7 settlement because this settlement was based upon either
8 intentional or negligent fraud.

9 THE COURT: All right. Thank you.

10 Given all the new stuff I will allow very brief, I
11 guess it's reply or surreply or whatever we're up to.

12 MS. RUBIN: Thank you so much.

13 Your Honor, there's been a lot of discussion
14 between -- well, it's no longer this morning. I guess this
15 afternoon between you and Mr. Davis about the requirements
16 of Rule 8 and Rule 9. And I want to take a step back
17 because I'm not sure that that's the applicable standard
18 that applies to a Rule 60 motion.

19 Mr. Davis has not interposed an adversary
20 proceeding or a complaint. That's not what's at issue here.
21 It's a Rule 60 motion. And, Your Honor, I want to refer you
22 to the Second Circuit's decision in Coe versus RJM, LLC.
23 The citation is 372 Fed. Appx. 188.

24 THE COURT: Another summary opinion?

25 MS. RUBIN: It is a summary order, Your Honor, of

1 the Second Circuit in 2010. And I mentioned Coe earlier as
2 the basis for my statement that Rule 60(b) motions, in
3 addition to meeting the test that I enunciated earlier, that
4 Coe puts the meat on that bones and says that it can't be
5 unsubstantiated allegations.

6 Let me tell you a little bit more about the Coe
7 case, Your Honor, if I might.

8 The Coe case is a Rule 60 motion that was made to
9 the Bankruptcy Court originally as the basis for a motion
10 for reconsideration of a denial of a motion to lift the
11 automatic stay. And the Court didn't say there that Rule 60
12 motions are governed by Rule 8 or Rule 9 or the plausibility
13 standard in Ashcroft.

14 Rather, the Court is saying the following, Your
15 Honor. In reviewing the denial of the motion for
16 reconsideration under Rule 60, the Second Circuit says as
17 follows: "As the Bankruptcy Court properly determined,
18 appellant made only substantiated allegations that she did
19 not receive the appellee's objections to her claim." And he
20 goes on to say "her allegations are unsupported by any
21 affidavits or other evidence. Appellant, therefore, failed
22 to meet her burden under Rule 60(b)."

23 THE COURT: Pause, then. You're saying, then,
24 that not even plausible allegations are enough, but you have
25 to come forward with some evidentiary showing either by

1 affidavit or documentary evidence --

2 MS. RUBIN: Yes, I am, Your Honor.

3 THE COURT: -- or something of that character?

4 MS. RUBIN: Yes, I am, Your Honor. And certainly
5 Mr. Davis or Mr. Weintraub hasn't cited any cases to the
6 contrary holding that Rule 60(b) motions are subject to the
7 lesser standard of pleading on Rule 8 and Rule 9.

8 So, Your Honor, I believe that the time for Mr.
9 Davis to have come forward with evidence was in his moving
10 brief. He didn't do that in his moving brief. He didn't do
11 that in his reply. He didn't do that when he came before
12 the Court with a no stay pleading or in his corresponding
13 oral presentation to Your Honor on August 18th. He didn't
14 do that in the complaint that was filed originally in Texas
15 Court and then was removed to Federal Court.

16 Your Honor, there are -- there's a mismatch here
17 between what Mr. Davis is saying. So his allegations in his
18 complaint are as follows:

19 One, here are all the things that my client asked
20 for in discovery requests in the underlying litigation and,
21 two, here are all the things that I think we now know
22 General Motors knew at the time. But there's a fundamental
23 mismatch between those two things and what actually might be
24 missing.

25 And, you know, as someone here quipped this

1 morning to me, Mr. Davis doesn't connect the dots for his
2 client, for the Court, and certainly not for my client or
3 Mr. Steinberg. You were right to observe this is a
4 constantly moving target. He doesn't say this is the
5 document that was missing. This is the document that was
6 withheld. Let me identify for the Court what I know today
7 that General Motors had in hand prior to my client's
8 settlement with Motors Liquidation Company in August 2010.

9 Instead he just says, here are the things we asked
10 for. Here are the things we now think GM knew and it's not
11 clear that the things GM is now perceived to know -- which,
12 by the way, are documented by citations to plaintiff's pre-
13 sale consolidated complaint, for example. It's not even by
14 reference to hard evidence in terms of what GM knows. It's
15 a series of -- a litany of media articles, paragraphs and
16 pre-sale consolidated complaint.

17 But the two things never come together. He
18 doesn't identify, much less provide the Court with the
19 documents or information that he alleges was withheld from
20 his client. Instead, he uses the veneer of the ignition
21 switch defect and what the public and the Court now
22 understand was withheld to say there was some sort of
23 discovery misconduct. And that, Your Honor, I would submit
24 to you is not enough to satisfy his client's burden on a
25 Rule 60 motion.

1 I would encourage Your Honor, for example, to look
2 at paragraph 31 of his moving brief, which I think is a good
3 illustration of this. Okay. The car that Mr. Davis's
4 client's husband was driving is as we've discussed already a
5 2004 Chevrolet Malibu Classic. In paragraph 31 of the
6 moving brief he says, when did GM know about this
7 potentially fatal flaw concerning the wiring harness. He
8 says, as shown GM knew these facts in 2008-2009 during the
9 height of the 2007 litigation. The citation is to a USA
10 Today article.

11 He then continues, citing that article, the
12 documents show that in 2009 GM recalled about 8,000 Pontiacs
13 from the 2005 and 2006 model years because the brake lights
14 might not work when the driver stepped on the brake pedal.
15 The company did not recall later model G6's or the Chevrolet
16 Malibu or Saturn Aura until three weeks ago. The cars are
17 nearly identical.

18 He goes on from there to make the assumption that
19 the cars that are recalled as discussed in this USA Today
20 article are, in fact, identical to the car that his client
21 was driving. But there's no proof of that, Your Honor.
22 There's no submission of that.

23 And certainly, as Your Honor pointed out, to the
24 extent that the deposition transcripts that he was
25 referencing earlier would have provided that proof, they

1 haven't been provided to the Court. They haven't been
2 provided to our client. I don't know as I sit here today
3 whether or not these 2005 and 2006 model year Pontiac G6's,
4 there's any resemblance whatsoever to the 2004 Chevrolet
5 Malibu Classic that is, in fact, at issue.

6 And so I hate to run too far afield on the merits
7 of this case because, Your Honor, as I submitted to you
8 before and Mr. Steinberg did amply as well, this case should
9 be decided on standing alone. The settlement agreement and
10 the transfer together I would submit establish that the
11 relief that Mr. Davis is asking for from this Court is
12 inappropriate at this juncture as sympathetic and tragic as
13 his client's circumstances are.

14 But even if we were to overcome the standing
15 threshold, Your Honor, even if we were to overcome the
16 timing issues that are discussed in much greater detail in
17 our brief and in New GM's brief, the law that's applicable
18 here is Rule 60. And even if Mr. Davis is entitled to
19 proceed under Rule 60(b)(6), which we would submit he is
20 not. This is a 60(b)(3) motion. Even if that's the
21 applicable rule, he hasn't met his client's burden of proof
22 and he doesn't get to come into this court and make bald
23 unsubstantiated allegations based on an inflamed public
24 record and say that he gets a do over with the GUC Trust,
25 particularly when, Your Honor, the question of whether he's

1 an ignition switch plaintiff or not seems to be an open one.

2 I'll just -- I'll submit to Your Honor that
3 Exhibit 10 to my declaration and response is the complaint
4 that Mr. Davis filed in Texas Court. And in that complaint
5 he identifies the ignition switch defect as one of the
6 things that he believes led to or possibly led to the
7 accident that killed Ms. Phillips' husband and four
8 children.

9 If Mr. Davis is, in fact, a pre-closing accident
10 plaintiff with ignition switch defect related claims, then
11 he is not only represented by Mr. Weintraub, which as I
12 understand in dispute, but he's also subject to Your Honor's
13 threshold issues decision and he's subject to the equitable
14 mootness holding there. And maybe that's the end of the --
15 a separate end of the story. We would encourage Your Honor
16 to look at page 10 -- Exhibit 10 to my declaration at page
17 4.

18 And then the final thing I want to say, and I've
19 let this go unanswered a number of times. It's an
20 inflammatory accusation, the question of what MLC and Old GM
21 said in litigating the claim. Certainly, Your Honor, I
22 wasn't there at the time. My firm was not there at the
23 time. But I'll just submit to Your Honor Exhibit 11, I
24 believe, to New GM's brief, is the mediation submission of
25 Motors Liquidation Company with Ms. Phillips. And -- I'm

1 sorry. It's Exhibit 4, I believe. And on page 11 there's a
2 footnote there where Motors Liquidation Company clarifies
3 that it's not proceeding on a theory of murder/suicide.

4 And so to the extent that that continues to be
5 made a part of the record today, I certainly wanted to
6 clarify for the record that it's not my understanding that
7 at the end of the day the mediation was --

8 THE COURT: And you're saying that --

9 MS. RUBIN: -- an allegation.

10 THE COURT: -- that mediation statement -- you're
11 not saying, but you would say the mediation statement isn't
12 hearsay because it's a statement independently -- simply of
13 its position and it's not asserted for the truth on this
14 event?

15 MS. RUBIN: That's correct, Your Honor. Again,
16 you know, I haven't -- not thinking through the panaplea of
17 evidentiary issues that might arise here, Your Honor, I just
18 simply wanted to correct the record in terms of the
19 submissions that were made.

20 THE COURT: You're saying that when somebody says
21 something to a court as to somebody else and it has
22 independent significance it doesn't matter whether it's true
23 or not. They said they were not relying on it.

24 MS. RUBIN: They said to the mediator that to the
25 extent that there were previous -- to the extent there were

1 previous statements made in the course of the litigation for
2 purposes of the mediation and for purposes of resolving the
3 case through a settlement they were no longer relying on
4 that theory.

5 THE COURT: All right.

6 MS. RUBIN: They acknowledged that Mr. Powlege,
7 for example, could have had a major health event or could
8 have suffered -- could have inadvertently -- I believe the
9 footnote says could have inadvertently put his foot on one
10 pedal when he meant to press another.

11 And, obviously, Your Honor, I wasn't there at the
12 time. I just would like to clear the name of those who were
13 involved in the mediation to say that wasn't their theory,
14 at least on submission in writing to the mediation.

15 Thank you --

16 THE COURT: All right.

17 MS. RUBIN: -- Your Honor.

18 THE COURT: Okay. For the only matter that must
19 be done today, which is whether I should reopen the record
20 to allow still another opportunity to add evidence to the
21 60(b) record by introduction of depositions, I am denying
22 that request.

23 When a Court deals with matters of this character,
24 the Court cannot, consist with appropriate judicial
25 administration, authorize such moving targets and repeated

1 efforts to put more material into a record that could have
2 and should have been presented earlier.

3 As I indicated earlier, if there were facts from
4 those depositions, which putting aside whether plausible
5 allegations are sufficient or more robust evidentiary proof
6 such as by affidavit, deposition testimony is required under
7 60(b) as to which I will confirm through the cases that Ms.
8 Rubin is correct in her assertion, either way that
9 opportunity existed previously and it -- nothing has been
10 brought to my attention to show that it couldn't have been
11 put in earlier.

12 So the only remaining issue, then, is how long,
13 assuming it's reasonable, new GM and the GUC Trust desire to
14 respond to the late submission of the Minnesota case,
15 Spaulding, because by reason of its eleventh hour production
16 they're entitled to an opportunity to put in something if
17 they choose.

18 The fact that I need to provide that opportunity
19 coupled with the fact that both sides brought to my
20 attention decisions that I need to read means that I can't
21 rule today from the bench.

22 So, Mr. Steinberg, Ms. Rubin, how long do you need
23 to either put in a response on Spaulding or to tell me that
24 you waive your opportunity?

25 MR. STEINBERG: Your Honor, I think today's

1 Thursday. We could do it by Tuesday, the close of business
2 on Tuesday.

3 THE COURT: Is that equally true of you, Ms.
4 Rubin?

5 MS. RUBIN: Sure.

6 THE COURT: Okay.

7 MR. STEINBERG: Your Honor, if I may, if I had
8 been given an opportunity there was --

9 THE COURT: Pull a mic close to you, please.

10 MR. STEINBERG: I'm sorry.

11 If I had been given the opportunity I would have
12 wanted to say something about the Playboy case that was
13 cited first in the reply and on the Lawrence case. May I
14 include that very briefly via paragraph or two in the letter
15 that I file by Tuesday?

16 THE COURT: If they were submitted in the reply,
17 I'm going to give Mr. Davis the choice.

18 Do you want their response in writing or do you
19 want to give them a chance to be heard now?

20 MR. DAVIS: I will defer to counsel.

21 THE COURT: You can do whichever you prefer, Mr.
22 Steinberg.

23 MR. STEINBERG: Your Honor, I think I could do it
24 in two minutes so that it will save you some reading.

25 THE COURT: Okay.

1 MR. STEINBERG: With regard to the Lawrence case,
2 which was the issue about whether the one-year statute of
3 limitation for 60(b)(3) applied, I just wanted to point out
4 to Your Honor that there is a footnote, Footnote 9 of that
5 decision where the Second Circuit said that they -- people
6 have been counting the time period on the wrong start point,
7 and that actually this thing was timely filed within the one
8 year.

9 So this decision doesn't really stand for any
10 other proposition other than this was a timely filed
11 60(b)(3) application. So that was -- that was all I had
12 wanted to say on the Lawrence point.

13 With regard to the Playboy case where there was a
14 reference to the New York law and it was as to what New York
15 law would hold about setting aside a settlement agreement,
16 in that particular case the argument was whether there was a
17 breach of a particular term of the settlement agreement
18 which would justify a vacating it on the grounds of fraud
19 and misrepresentation.

20 The particular term was that the settlement
21 agreement provided that there should be no reference to an
22 injunction that had been executed -- entered into as part of
23 the settlement, so they couldn't introduce the injunction in
24 the context of a later trial.

25 And the Court was then deciding whether the cross-

1 examination of a witness turned out to be the introduction
2 of evidence and the Court said it wasn't, denied 60(b)
3 relief. But it was all in the context of a breach of a
4 particular representation or really in this case a covenant
5 in a settlement agreement. And that's obviously not the
6 circumstance here.

7 THE COURT: All right. Thank you, folks.

8 The matter will be submitted and we're adjourned.

9 MR. WEINTRAUB: Your Honor, could I be heard on
10 one -- one last thing, Your Honor?

11 The Court had asked --

12 THE COURT: Is it something new that -- all right.
13 Come on up, Mr. Weintraub.

14 MR. WEINTRAUB: It's revisiting something.

15 The assignment of claims, which was something that
16 --

17 THE COURT: Wait. Is this something -- rearguing
18 something that came up almost literally hours ago?

19 MR. WEINTRAUB: I don't know if it was hours ago,
20 Your Honor, but this seemed the most opportune time rather
21 than to interrupting the flow of everything else that was
22 going on.

23 THE COURT: You realize if I hear what you have to
24 say now I've got to give your opponents a comparable
25 opportunity.

1 MR. WEINTRAUB: I understand, Your Honor. It's
2 just with respect to submitting it to the Court. I could
3 not find the confidentiality provision in there. So I would
4 like to confer with counsel and see if they can point me to
5 the confidentiality provision. I think we could put in the
6 assignment of claim which is part -- which is the agreement
7 that Ms. Powlege signed without the --

8 (Pause)

9 MR. WEINTRAUB: May I confer with counsel?

10 THE COURT: No. This is what I want you to do
11 since I can't decide it today anyway, and I don't want to
12 hear more oral argument, and the only issue is whether or
13 not I see a document.

14 I want you to meet and confer with Mr. Steinberg
15 and Ms. Rubin and determine, (a) whether it's relevant; (b)
16 whether it's violative of a confidentiality obligation; and
17 (c) whether they agree to it, its consideration, object to
18 its consideration or agree to its consideration subject to
19 their ability to comment on it.

20 And I want any further submissions on this solely
21 in writing.

22 MR. WEINTRAUB: Understood. Thank you, Your
23 Honor.

24 THE COURT: Okay. We're adjourned.

25 MR. STEINBERG: Your Honor -- Your Honor --

1 THE COURT: Yes.

2 MR. STEINBERG: -- I hate to be the one -- to be
3 the one to stand up for the parties, but there was a letter
4 that we had written to Your Honor with regard to the April
5 29th letter that was submitted to Judge Ferman and we hoped
6 that the letter that we had submitted by the counsel here
7 was satisfactory to Your Honor.

8 I will note that there was a short colloquy at the
9 April 24th hearing with regard to that issue. And to the
10 extent that Your Honor has not seen that, we would be
11 prepared to hand up the three pages in the transcript for
12 that as well, too, so you would have the complete issue that
13 related to that.

14 And Judge Ferman had entered an order on April
15 16th, the day after your decision, asking for the parties to
16 address the issue that they would otherwise brief in the
17 April 29th letter to be prepared to say that at the April --
18 address that at the April 24th hearing to the extent they
19 wanted to say something.

20 And so I have that one page order from Judge
21 Ferman. If you don't have it and you would like to see it I
22 could hand it up. I told the other side that I had that. I
23 just want to make sure, and maybe I'm leaning too far -- too
24 much the other way, but to make sure that Your Honor has
25 everything that --

1 THE COURT: I don't have it. And if my endorsed
2 order did not make it clear, it is a matter of concern to me
3 when the District Court hears about the progress of
4 compliance with one of my orders before I do and, in fact,
5 before -- unless I take corrective action without me hearing
6 about it at all.

7 I mean, when I discovered of the existence of it,
8 so everybody knows something, I asked Judge Ferman's
9 chambers to provide me with a copy of the letter, which it
10 did. But there was no reason why -- by which I needed to
11 contact Judge Ferman to hear about compliance with one of my
12 orders and how it could possibly be that anybody in the
13 world might think it appropriate to communicate with Judge
14 Ferman without copying me on something that talks about
15 compliance of the undertaking that I had required.

16 Now I understood that at least once and perhaps
17 twice in that letter there was an apology for that. Fine.
18 Apology accepted. But it better not happen again.

19 MR. STEINBERG: Understood, Your Honor. And I was
20 standing to rise not to sort of to raise an issue that I --
21 that I assumed had -- had hoped we had put to bed because we
22 had all agreed that we would do that, but because I thought
23 that there may be a couple of other things relevant to what
24 Your Honor should see and I wanted to be able to present
25 that. So --

1 THE COURT: I understand and appreciate that.

2 MR. STEINBERG: Okay.

3 THE COURT: My endorsed order should now be deemed
4 to have been complied with.

5 MR. STEINBERG: So --

6 THE COURT: Or at least it will be assuming I get
7 something under the time limit that was promised to me.

8 MR. STEINBERG: So I --

9 THE COURT: But I also assumed that people
10 understood the import of that order and there will not be
11 further instance -- instances of that kind of thing.

12 MR. STEEL: Your Honor, if I may for --

13 THE COURT: Yes, come up, please.

14 MR. STEEL: -- sort of for good conscious for the
15 record. It's Howard Steel of --

16 THE COURT: Yes, Mr. Steel.

17 MR. STEEL: -- Brown Rudnick on -- designated
18 counsel on behalf of the economic loss plaintiffs.

19 Mr. Weisfelner is out of the country. We
20 appreciate Your Honor's acceptance of our letter and I
21 appreciate the opportunity to express our collective regret
22 for the oversight not submitting the joint letter. It won't
23 happen again, Your Honor.

24 THE COURT: Thank you, Mr. Steel.

25 MR. STEINBERG: If I could hand this to your

1 clerk, Your Honor, the --

2 THE COURT: Yes. To my clerk, please, Mr.
3 Steinberg.

4 MR. STEINBERG: And the relevant excerpt is only
5 on pages 33 through 35, but we did give you the full
6 transcript.

7 THE COURT: Thank you.

8 All right. Do we have any further business?

9 Hearing none, we're adjourned.

10 COURTCALL OPERATOR: Your Honor, may I disconnect?

11 THE COURT: Yes, you may, Courtcall.

12 COURTCALL OPERATOR: Thank you.

13 (Whereupon, these proceedings concluded at 12:30 p.m.)

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C E R T I F I C A T I O N

We, Dawn South and Sherri L. Breach, certify that the
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